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✓FEDERAL PROCEDURE AT LAW

A TREATISE ON THE PROCEDURE IN

SUITS AT COMMON LAW

IN THE

CIRCUIT COURTS OF THE UNITED STATES

**ACCOMPANIED WITH, AS A
BASIS OF FEDERAL JUDICIAL PROCEDURE,
A STATEMENT OF THE DUAL SYSTEM OF GOVERNMENT
CREATED BY THE FEDERAL CONSTITUTION AND THE CONSTITUTIONAL
LIMITATIONS IMPOSED UPON THE STATE AND FEDERAL GOV-
ERNMENTS AND THE CREATION OF THE FEDERAL
JUDICIAL SYSTEM AND THE JURISDICTION
OF ALL THE FEDERAL COURTS**

By C. L. ~~BATES~~

OF THE BAR OF SAN ANTONIO, TEXAS

(AUTHOR OF BATES' FEDERAL EQUITY PROCEDURE)

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TABLE OF CONTENTS.

VOLUME II.

CHAPTER XV

THE COMMON-LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES.

(a) STATEMENT OF SOME GENERAL PRINCIPLES INTRODUCTORY TO THIS CHAPTER.

§ 653. The circuit courts have no appellate jurisdiction,	491
654. Same—Exception—Review of the decisions of the board of general appraisers of merchandise,	492
655. The circuit court the great court of original jurisdiction, ..	492
656. Extent of the judicial power—A great political principle,	493
657. Same—A new political principle established by the constitution,	494
658. Distinction between judicial power and jurisdiction,	495
659. Jurisdiction defined,	496
660. Same—Continues until the judgment is satisfied,	496
661. Power to issue writs necessary for the exercise of jurisdiction,	497
662. Same—Writs of injunction in aid of jurisdiction,	498
663. The jurisdiction of the federal courts defined by federal legislation,	498
664. Same—Four great federal judiciary acts,	499
665. The jurisdiction of the circuit courts is either concurrent or exclusive,	499
666. Object and purposes of this chapter,	499
667. Same—The word “concurrent”—Its broad significance in the federal judiciary acts,	500

(b) THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES CONCURRENT WITH THE COURTS OF THE SEVERAL STATES.

668. Jurisdiction of suits arising under the constitution, laws and treaties of the United States,	502
669. Same—Defined,	503
670. Same—Same—Cause of action must depend on construction and application of the constitution, law, or treaty,	504
671. Same—Same—Jurisdiction must appear from plaintiff's own statement of his claim,	505

§ 672. Same—Same—Averment of frivolous constitutional question,	506
673. Same—Constituent elements of the jurisdiction,	506
674. Same—Same—Same—The facts must be pleaded,	507
675. Same—Three classes of cases arising under this head of federal jurisdiction,	508
676. Suits arising under the constitution—Not susceptible of classification,	508
677. Same—State laws "impairing the obligation of contracts,"	509
678. Same—Same—Contracts made by state,	510
679. Same—Same—Same—The Virginia tax and coupon cases,	511
680. How a suit in equity may arise under the federal constitution,	513
681. Same—Suit in equity to enjoin unconstitutional sale of property for taxes,	514
682. Same—Suit in equity to protect land grant to railroad company,	516
683. Same—Restraining state officers from executing unconstitutional statute,	516
684. Same—Restraining state officers from wrongful administration of valid state statutes,	517
685. Same—May arise under any constitutional provision securing a right,	517
686. Municipal ordinances as laws "impairing the obligation of contracts"—Suits to enjoin,	517
687. Suits at law arising under the federal constitution,	518
688. Same—Action of trespass against state officers for seizure of property under constitutional state statutes,	518
689. Same—Same—Barry v. Edmunds,	519
690. Same—Same—Scott v. Donald,	520
691. Same—Same—Exemplary damages as an element in a case arising under the constitution,	521
692. Same—Suit arising under both the constitution and a federal statute,	522
693. Suits arising under the laws of the United States,	523
694. Same—Suits on the official bonds of federal officers,	524
695. Same—Same—Suit on bond of United States marshal,	524
696. Same—Same—Suit on bond of federal court clerk,	524
697. Same—Suit to enforce individual liability of shareholders of liquidating national bank,	525
698. Same—Ejectment when plaintiff's title depends upon validity of patent from the United States,	525
699. Same—Ejectment when plaintiff claims title through judicial sale under federal court judgment,	525
700. Same—Two corporations claiming same land under different acts of congress,	526
701. Same—Suit to test validity of the consolidation of railroad companies under acts of congress,	526
702. Suits by and against federal corporations,	526

TABLE OF CONTENTS.

v

§ 703. Same—Same—Rule abolished as to national banks,	527
704. Same—Suit against receiver of national bank,	527
705. Same—Suit against federal court receiver does not arise under laws of the United States,	527
706. Same—Suit against election officers for wrongful denial of right to vote for member of congress,	528
707. Suits arising under treaties of the United States,	528
708. Same—Treaty provisions removing disability of alien to take and hold lands,	530
709. Jurisdiction based on diversity of citizenship,	531
710. Same—Not residence, but citizenship,	531
711. Same—Territories not states within the meaning of the federal constitution and judiciary acts,	531
712. Same—Corporation created by a state a citizen thereof,	532
713. Same—Same—Incorporation in more than one state,	532
714. Same—Citizenship of national banks for purposes of jurisdiction,	532
715. Same—A state not a citizen,	533
716. Same—Same—Suit brought by state on relation of a party,	533
717. Same—Persons standing in a fiduciary relation suing or sued,	533
718. Same—Suit by assignee of chose in action,	534
719. Same—Same—Bill for specific performance,	535
720. Same—Same—Exceptions—Notes of corporations payable to bearer,	535
721. Same—Same—Foreign bills of exchange,	535
722. Same—Same—The fact of assignment,	536
723. Same—Several plaintiffs and defendants,	536
724. Jurisdiction of suits between citizens of a state and foreign states, citizens or subjects,	536
725. Same—Corporation created by a foreign state a citizen thereof,	537
726. Jurisdiction of suits in which the United States are plaintiffs,	538
727. Jurisdiction founded on claim to lands under grant of different states,	538
728. The amount in dispute—In what class of cases the jurisdictional sum or value of two thousand dollars is necessary to maintain jurisdiction,	538
729. Same—Rules for determining the amount in dispute,	539
730. Same—Same—Rule when amount is to be determined from the face of a pleading,	541
731. Same—Same—Same—Cases justifying exemplary damages,	541
732. Same—Same—Rule when amount is to be determined upon an issue of fact,	541
733. Same—Same—Rule when there are several parties, plaintiffs or defendants,	542
734. Same—Same—When interest is a principal demand, and when an accessory demand,	543

§ 735. Same—The jurisdictional amount not required in ancillary suits,	544
736. Jurisdiction once vested is not ousted by subsequent events,	545
(c) THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES UNDER SPECIAL STATUTES.	
737. Suits at common law by the United States or officers thereof,	545
738. Same—Suits by receivers of national banks,	546
739. Same—Action of debt on postmaster's bond,	546
740. Suits at law or in equity arising under the revenue laws, ..	546
741. Same—Revenue laws defined,	547
742. Same—Suit in equity to enforce internal revenue tax lien, ..	547
743. Suits arising under the postal laws,	547
744. Same—Suits to recover money wrongfully or fraudulently paid out by postoffice department,	547
745. Same—Suits in equity to set aside fraudulent conveyances,	548
746. Suits for recovery of penalties for violation of laws regulating carriage of passengers in merchant vessels,	548
747. Condemnation of property used in aid of insurrection,	548
748. Suits arising under laws relating to slave trade,	549
749. Suits by assignees of debentures,	549
750. Suits arising under the patent laws of the United States, ...	549
751. Same—Defined,	549
752. Same—Bill in equity to enjoin infringement,	550
753. Same—Same—Bill for naked accounting not maintainable,	550
754. Same—Trespass on the case for infringement,	550
755. Same—Suits arising out of contracts in relation to patents,	551
756. Same—Suits to enjoin collection of taxes levied on patent rights,	551
757. Suits arising under the copyright laws of the United States,	551
758. Same—Jurisdiction of district courts in suits to recover penalties,	552
759. Same—Action of debt for penalties,	552
760. Suits by the United States or officers against national banking associations,	552
761. Suits by national banks to enjoin the comptroller of the currency,	552
762. Suits for injuries done under the revenue laws of the United States,	553
763. Suits to enforce the right of citizens to vote,	553
764. Suits to redress deprivation of rights secured by the constitution and laws of the United States,	553
765. Suits for injuries resulting from conspiracies in violation of the "civil rights" act,	554
766. Same—Suits against persons having knowledge of such conspiracies,	554
767. Suits by and against trustees in bankruptcy,	554
768. Proceedings by the federal government to condemn private property for public use,	555

TABLE OF CONTENTS.

vii

§ 769. Suits against the government under "the Tucker act,"	555
770. Actions of debt for penalties under laws prohibiting importation of foreigners under contract to labor,	556
771. Jurisdiction of suits under the act to prevent unlawful occupancy of the public lands,	556
772. Suits for partition when United States are one of tenants,	557
773. Seizure and destruction of obscene books, pictures and other articles imported from foreign countries in violation of law,	557
774. Suits in equity and actions at law arising under the acts of congress, to protect trade and commerce against unlawful restraints and monopolies,	557
775. Same—Suits for injunction can be brought only by the United States,	558
776. Same—The damages must be recovered by direct suit and not by set-off,	558
777. Same—Applies to common carriers by railway—Suits to annul illegal traffic arrangements,	559
778. Same—Same—Consolidation of capital stock of competing lines in holding company for purpose of joint control—Suit to enjoin,	559
779. Same—Combinations in restraint of trade among states, in articles of commerce—Injunction,	560
780. Suits under the act to regulate commerce,	560
781. Same—Rate-making power vested in the commission—Suits to enjoin orders of commission,	562
782. Jurisdiction to naturalize aliens as citizens of the United States,	563
783. No jurisdiction in original mandamus proceedings,	563

CHAPTER XVI.

THE REMOVAL OF CAUSES.

784. The removal of causes controlled by judiciary act of March 3, 1887, as corrected by act of August 13, 1888—Two exceptions,	565
785. Removal only a method by which federal courts acquire original jurisdiction of causes,	566
786. Same—State courts not bound to surrender jurisdiction if record fails to show removable suit,	567
787. Same—Federal court may protect its jurisdiction by injunction,	567
788. Right of removal limited to suits which could have been originally brought in federal court,	568
789. Same—Classification of suits which may be removed from state courts into federal circuit courts,	569
790. Same—Same—All suits of a civil nature at common law or in equity,	570

§ 791. Same—Same—Same—Illustration — Condemnation proceeding,	570
792. Same—The two classes of cases removable under special statutes,	570
793. To what circuit court the removal of the cause is to be made,	571
794. Defendants only can remove a cause,	572
795. Same—None but non-resident defendants can remove—One exception,	572
796. All defendants required to join in application for removal—Exceptions,	573
797. Removal of suits arising under the constitution or laws or treaties of the United States,	573
798. Same—Nature of case must appear from plaintiff's statement of his own claim, or it cannot be removed,	573
799. Same—Same—When defendant is a federal corporation,	574
800. Same—Same—Suit against receiver appointed by federal court not removable,	574
801. Same—All defendants must join in the application for removal,	574
802. Removal of suits between citizens of different states,	575
803. Same—Statutory provision,	575
804. Same—When diversity of citizenship must exist,	576
805. Removal of suits between citizens and aliens,	576
806. Removal on ground of "separable controversy,"	576
807. Same—"Separable Controversy" defined,	577
808. Same—Same—Action of tort against several defendants, ...	579
809. Same—Same—Same—Right of state to regulate action for negligence,	579
810. Same—Removal on this ground carries entire suit,	579
811. Removal on the ground of prejudice or local influence,	580
812. Same—No removal unless suit could originally have been brought in the circuit court,	581
813. Same—None but defendants can remove,	581
814. Same—Removal not allowed as between defendants,	581
815. Same—Application must be made to federal circuit court—When made,	581
816. Same—Statutory jurisdictional amount must be involved, ..	582
817. Procedure to remove causes—Petition and bond—When to be filed,	583
818. Same—Application must be made when plea is due,	584
819. Same—Same—When suit becomes a removable one after plea is due,	584
820. Same—What petition for removal should state,	585
821. Same—Issues of fact must be tried in the circuit court,	585
822. Same—What citizens of same state claim land under grants of different states,	586
823. Procedure for the removal of causes on the ground of prejudice or local influence,	586
824. Same—Judicial inquiry into the facts,	586

TABLE OF CONTENTS.

ix

§ 825. Remanding causes to the state courts,	587
826. Same—Effect of this legislation,	588
827. Same—Remanded because not removed within time allowed by law,	588
828. Removal of suits against persons denied civil rights,	589
829. Removal of suits against revenue officers,	590
830. Same—Prosecutions of crimes against the states belong to their courts—Exceptions,	590

CHAPTER XVII.

THE DISTINCTION BETWEEN LAW AND EQUITY AND LEGAL AND EQUITABLE REMEDIES PRESERVED IN THE FEDERAL COURTS.

(a) STATEMENT OF THE GENERAL DOCTRINE.

831. The judicial power of the United States embraces three classes of cases,	593
832. The distinction between law and equity and legal and equi- table remedies established by the constitution,	593
833. The distinction between legal and equitable remedies is one of substance,	594
834. The rule requiring legal and equitable remedies to be sep- arately pursued not changed by federal adoption of state procedure in actions at law,	594
835. Same—Action of assumpsit or debt on simple contract and creditor's bill cannot be blended in one suit in the fed- eral courts,	595
836. Same—Actions at law cannot be brought in federal equity, nor legal and equitable claims blended in one suit,	596
837. Same—Same—Jury summoned to try issues in chancery not the equivalent of constitutional right of trial by jury in a court of law,	596
838. Same—Same—Bill in equity to remove cloud not maintain- able when plaintiff has legal title and defendant is in pos- session,	597
839. Same—Same—Same—When the lands are wild and unoccu- pied,	598
840. Assignee of chose in action cannot without "special circum- stances" sue in equity to collect it,	598
841. Equity no jurisdiction of a naked accounting of profits and damages against infringer of patent,	598
842. A proceeding to assess damages for taking private property for public use cannot be joined with a proceeding to en- join the taking,	599
843. Federal courts have no jurisdiction of a bill in equity in cases of fraud to recover damages,	599
844. Federal courts sitting as courts of law cannot entertain suits in equity,	599

§ 845. Same—Mechanic's lien cannot be enforced in an action at law in the federal courts,	600
846. Same—Suit to enjoin collection of taxes in state of Louisiana,	600
847. Equitable defenses cannot be interposed to actions at law, ..	600
848. Same—Equitable set-off cannot be interposed as a defense to an action at law,	601
849. Federal courts will enforce new equitable rights created by state statutes—Limitation upon the rule,	601
850. Same—Whether a case is one of common law or equitable cognizance determined by its essential character,	603
851. A federal court sitting in equity has no jurisdiction of the common law action of assumpsit,	603
852. Legal defenses to purely legal demands cannot be availed of by bill in equity,	603
853. Same—Bill in equity will not lie to cancel life insurance policy for fraud, after death of cestui que vie,	604
854. Same—Action at law on municipal bonds not enjoined on ground of fraud,	605
855. Same—Action of ejectment not enjoined upon the ground that plaintiff's muniments of title are void,	605

(b) SUITS TO RECOVER LAND.

856. Federal courts have no jurisdiction of suits in equity to recover land,	606
857. Same—Ejectment bill not aided by prayer for an accounting,	606
858. Same—Ejectment bill cannot be maintained upon an equitable title,	607
859. The legal title necessary to maintain the action of ejectment,	607
860. Same—No exception to the rule at common law—Lord Mansfield's doctrine based upon the presumption that legal estate had been conveyed to the equitable owner,	608
861. Same—Same—Same—Fenn v. Holme,	609
862. Same—Same—Same—Lord Mansfield's doctrine followed in the federal courts,	609
863. Patents issued by the United States are conclusive evidence of the legal title,	611
864. Same—Jurisdiction of the land department,	612
865. Patents necessary to convey legal title under swamp land act of 1850,	612
866. Exceptions to the rule requiring patent to convey the legal title to public lands,	613
867. Void patents may be collaterally attacked,	614
868. Ejectment not maintainable on certificates of registers and receivers of the government land offices—Statutes of Arkansas and Nebraska,	615

TABLE OF CONTENTS.

xi

§ 869. Mississippi statute declaring that land office certificates shall vest legal title—Not binding on Federal courts,	615
870. Ejectment not maintainable in the Federal courts sitting in California on certificates of land purchase issued by that state,	616
871. Ejectment not maintainable in the Federal courts on land certificates, location and survey issued and made under the laws of Texas,	617
872. Ejectment maintained in the Federal courts in Pennsylvania on warrant and survey,	618
873. Ejectment maintained in the Federal courts on prior possession,	619
874. Ejectment maintained in the Federal courts on legal title by estoppel,	620
875. Plaintiff could not recover in ejectment at common law upon a title which did not subsist in him at the commencement of the action,	621
876. Equitable titles cannot be interposed as a defense to the action of ejectment,	621
877. Same—Title-bond and purchase money paid,	622
878. Same—Defendant not allowed to prove that patent was issued through mistake—Bagnell v. Broderick,	622
879. Same—Defendant not allowed to prove elder patent was founded on junior entry—Robinson v. Campbell,	622
880. Same—Defendant not allowed to show fraudulent survey, ..	623
881. Equitable estoppel may be set up at law as a defense to an action of ejectment,	623
882. Whatever tolls plaintiff's right of entry will defeat the action of ejectment,	624
883. Cross bill in equity not maintainable to recover land on a legal title,	624

CHAPTER XVIII.

SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

884. The primary object of this work,	625
885. The object of this chapter is to define suits at common law, ..	626
886. Same—A knowledge of the scheme of the government essential to an understanding of jurisdiction and procedure, ..	627
887. Same—Principles established in the previous discussion—Three classes of cases—Distinction between law and equity,	629
888. A summary of the common-law jurisdiction of the circuit courts, concurrent with the courts of the several states, ..	630
889. Summary of the common-law jurisdiction of the circuit courts under special statutes,	631
890. Standard or rule for the classification of suits as being at law or in equity,	632

§ 891. Suits at common law defined,	638
892. Same—Embraces all suits to settle legal rights,	633
893. Important features of trial at common law,	633
894. Classification of suits at common law,	634
895. Same—Classification of contracts at common law,	634
896. Actions at law are local or transitory,	635
897. Same—Distinction preserved in the federal courts,	636
898. Parties to actions at law,	636
899. Same—Parties to actions on contracts,	637
900. Same—Parties to actions <i>ex delicto</i> ,	637
901. The common-law action of account,	638
902. Same—Concurrent jurisdiction in equity,	639
903. Annuity,	639
904. Assumpsit,	639
905. Same—The great common-law action,	641
906. Covenant,	642
907. Debt,	642
908. Detinue,	642
909. Same—Peculiar nature of the action,	643
910. Trespass <i>vi et armis</i> ,	643
911. Trespass on the case,	644
912. Same—Defined by Tidd,	644
913. Same—Action under Lord Campbell's Act,	645
914. Trover,	646
915. Replevin,	646
916. Ejectment,	647
917. Action for mesne profits,	647
918. Scire facias,	648
919. Same—Authority of federal courts to issue,	648
920. Proceedings to condemn property for public use,	648

CHAPTER XIX.

THE BASIS OF PROCEDURE IN SUITS AT COMMON LAW IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES —LIMITATIONS UPON THE OPERATION OF "THE ACT OF CONFORMITY."

921. The complex basis of federal procedure at law,	651
922. Same—Common law principles confirmed in the federal con- stitution,	651
923. The conformity act—Its language,	652
924. Same—The act restricted in its operation—Popular error con- cerning it,	653
925. Same—Must be construed in the light of the federal constitu- tion and laws,	653
926. Same—Power of the federal courts to reject subordinate pro- visions of state procedure—"As near as may be,"	654
927. Same—Purpose of the act,	654

TABLE OF CONTENTS.

xiii

§ 928. Same—Act applies “in like causes” only,	655
929. The personal administration of the judges not controlled by state procedure,	655
930. When federal courts will not conform to state procedure— General rule,	656
931. Same—When state procedure blends legal and equitable rem- edies,	656
932. Same—Same—When state procedure permits legal actions upon equitable titles,	657
933. When congress has legislated upon a matter of procedure, ..	657
934. Service of process and appearance not controlled by state laws,	657
935. When the state procedure would defeat the lawfully-acquired jurisdiction of the court,	658
936. Mode of trial not controlled by state legislation,	658
937. The mode of proof controlled by federal legislation,	659
938. Same—Production of documentary evidence,	660
939. Manner of instructing the jury—Submitting special issues —State procedure not binding on federal courts,	661
940. Jury carrying with them written evidence upon retiring from the bar,	661
941. Departure in pleading under code procedure defined by the common law,	661
942. Execution of judgments controlled by state law—When and how adopted,	662
943. Same—“Proceedings supplementary to execution,”	664
944. Refusing or granting new trial not controlled by state pro- cedure,	664
945. Preparing case for review on writ of error by appellate court not controlled by state procedure,	665
946. State procedure obligatory on federal courts—Subject to the above exceptions,	665

CHAPTER XX.

THE VENUE OF SUITS IN THE CIRCUIT COURTS OF THE UNITED STATES.

947. Suits are local or transitory,	667
948. The venue of suits in the federal courts regulated by fed- eral statute,	668
949. Suit must be brought in the state of which the defendant is a citizen and in the district whereof he is an inhabitant— General rule—Exceptions,	668
950. Same—Citizenship and residence of corporations,	669
951. Venue when the jurisdiction is founded on the diversity of the citizenship of the parties,	669

§ 952. Same—When there are more plaintiffs or defendants than one,	670
953. Same—Suits against national banks,	670
954. Venue of suits against aliens and alien corporations,	671
955. Venue of local suits,	671
956. Same—Not necessary that plaintiff or defendant shall be an inhabitant of the district where suit is brought,	672
957. Same—Suit to remove cloud from shares of stock in a corporation,	672
958. Same—Trespass <i>quare clausum fregit</i> ,	672
959. Special acts regulating venue in particular districts,	673
960. Venue of suits of which federal courts have exclusive jurisdiction not controlled by general judiciary act,	674
961. Same—Venue of suits for infringement of letters patent, ...	675
962. Same—Venue of suits under federal statute to protect commerce,	675
963. Same—Venue of actions for damages under the federal anti-trust act—Where defendant resides or is found,	676
964. Venue of suits for pecuniary penalties and forfeitures,	676
965. Venue of suits for internal revenue taxes,	676
966. Venue of suits by national banks to enjoin comptroller of the currency,	676

CHAPTER XXI.

PARTIES TO SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

967. The subject of parties controlled by state legislation—General rule,	677
968. Same—Limitations upon the rule,	678
969. Same—Same—Actions at law must be brought in the name of the party holding the legal title,	679
910. Same—Same—Actions at law must be brought against the party legally liable to plaintiff,	679
971. Same—Federal statute authorizing omission of parties defendant under certain contingencies,	680
972. Subject of parties controlled by the rules of the common law—When,	681
973. Parties to suits for duties, imposts, taxes, penalties, and forfeitures,	681
974. Death of parties— <i>Scire facias</i> to bring in executor or administrator,	681
975. Same—When one of several plaintiffs or defendants dies, ...	682
976. Death or expiration of term of public officer who is a party to a suit,	682

CHAPTER XXII.

THE STATE SYSTEM OF PLEADING FOLLOWED IN THE FEDERAL COURTS IN SUITS AT COMMON LAW—IMPORTANT EXCEPTIONS.

§ 977. State system of pleading adopted in the federal courts in suits at common law,	683
978. A summary of the limitations upon the rule that the federal courts are required to follow the state system of pleading,	684
979. Same—Equitable set-off and equitable counter-claim,	685
980. Reason and foundation of the rule limiting conformity to the state system of pleading,	685

CHAPTER XXIII.

PLAINTIFF'S DECLARATION, COMPLAINT OR PETITION IN A SUIT AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

981. The commencement of an action at law in the federal circuit courts,	687
982. The declaration, complaint or petition should conform to the laws of the state,	688
983. The general requisites of the declaration, complaint or petition,	689
984. The three essential elements of the body of the declaration, complaint or petition,	689
985. The declaration, complaint or petition must state a cause of action within the jurisdiction of a court of law,	689
986. Same—Must state a case upon which a court of common law has jurisdiction to render and execute judgment, ..	690
987. Joinder of causes of action at common law—Actions <i>ex contractu</i> ,	691
988. Same—Actions <i>ex delicto</i> ,	691
989. Same—Same—Exception to rule last stated,	692
990. Same—Same—Action against master and servant,	692
991. Same—Causes of action <i>ex contractu</i> and <i>ex delicto</i> cannot be joined,	693
992. Same—Same—Exception—Debt and detinue,	693
993. Same—All causes joined must be in the same right,	693
994. Same—Counts in trespass <i>quare clausum fregit</i> and <i>de bonis asportatis</i> may be joined,	694
995. Same—Counts in trespass <i>quare clausum fregit</i> and for assault and battery may be joined,	695
996. Same—Counts for false warranty and deceit may be joined,	695
997. Same—Duplicity,	695

§ 998. Same—Joinder under code procedure,	696
999. Same—Same—Joinder of legal and equitable causes of action,	696
1000. Same—Same—Death by wrongful act,	696
1001. Stating plaintiff's cause of action—Conformity to state pleading,	697
1002. The jurisdictional facts must be alleged,	698

CHAPTER XXIV.

PROCESS, SERVICE AND RETURN IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

1003. Necessity for service of original process upon defendant,	701
1004. Federal statutory requisites of the process for defendant,	703
1005. Same—Same—Power of the circuit and district courts to make rules controlling process,	703
1006. Process served by the marshal,	704
1007. Service of process in personal action on a money demand,	704
1008. Same—Service on foreign corporation,	705
1009. Same—Service upon aliens and alien corporations,	707
1010. Service in local suits where defendant resides in a district different from that in which the suit is brought,	707
1011. Same—Substituted service upon non-resident defendants,	707
1012. Return of the process,	708
1013. Persons privileged from the service of process,	708

CHAPTER XXV.

THE APPEARANCE OF THE DEFENDANT IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

1014. Two methods of obtaining jurisdiction over person of the defendant,	709
1015. Appearance at common law,	709
1016. Two kinds of appearances in federal procedure—General and special—Same at common law,	710
1017. General appearance defined—Its effect,	710
1018. What constitutes a general appearance,	711
1019. A general appearance cannot be withdrawn without leave of court,	711
1020. Special appearance defined,	712
1021. Same—A state statute giving to a special appearance the effect of a general appearance not binding on the federal courts,	713
1022. A petition for removal is a special appearance only,	713
1023. Absence of jurisdiction over subject-matter not waived by general appearance,	714
1024. Parties may appear by themselves or attorneys,	715

CHAPTER XXVI.

THE DEFENSES OF DEFENDANT IN A SUIT AT COMMON LAW
IN THE CIRCUIT COURTS OF THE UNITED STATES.

§ 1025. Preparing the defense,	716
1026. Classification of defenses to suits at law,	717
1027. Same—Plea in suspension of the suit,	717
1028. Same—These defenses exist in two forms,	717
1029. Defenses to the jurisdiction are of two classes,	718
1030. Pleas in abatement,	719
1031. Plea in bar defined,	719
1032. Classification of pleas in bar,	719
1033. Form and order of pleading the three defenses—Common law procedure—Code procedure,	720
1034. Defendant's defense must conform to state procedure— Important exception,	721
1035. Same—Plea to jurisdiction over person separately pre- sented—Illustration,	722
1036. Same—Same—Coupled with a demurrer to the merits,	724
1037. Plea denying jurisdiction of subject matter presented in general answer,	724
1038. Equitable defenses cannot be pleaded to actions at law,	725
1039. Resume,	726
1040. Cross-demands in actions at law available in federal cir- cuit courts,	726
1041. Equitable cross-demands cannot be pleaded in an action at law,	727

CHAPTER XXVII.

INTERVENTIONS IN SUITS AT COMMON LAW IN THE CIRCUIT
COURTS OF THE UNITED STATES.

1042. The remedy by intervention unknown at common law, ..	728
1043. The remedy by intervention available in actions at law in the federal circuit courts,	729
1044. Intervention cannot be used to blend legal and equitable remedies,	729

CHAPTER XXVIII.

AMENDMENTS OF PLEADINGS AND PROCESS IN SUITS AT COM-
MON LAW IN THE CIRCUIT COURTS OF THE UNITED
STATES.

1045. Court's power of amendment controlled by federal statute, ..	730
1046. Extent of the power to allow amendments,	730

§ 1047. Amendment of process,	731
1048. Allowance of amendments discretionary,	731
1049. Amendment after reversal by the supreme court,	732

CHAPTER XXIX.

TRIAL OF SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

1050. Two modes for the trial of issues of fact,	735
1051. Same—All material issues of fact,	736
1052. State law authorizing trial by referee not followed in federal courts,	736
1053. Mode of trying the issue of jurisdiction,	737

(a) TRIAL BY JURY.

1054. Must be a trial by a common law jury and a common law jury trial,	737
1055. Qualifications of jurors,	738
1056. Same—Certain persons disqualified to serve in suits arising under the "Civil Rights" act,	739
1057. Jurors apportioned to district by direction of the court,	739
1058. How jurors are drawn,	739
1059. Mileage and per diem of jurors,	740
1060. Writs of Venire Facias—How issued and served,	740
1061. Talesmen for petit jurors,	740
1062. Same—Provisions of revised statutes as to talesmen not repealed,	741
1063. Special jurors,	741
1064. Each party entitled to three peremptory challenges in civil cases,	741
1065. Same—Challenges are of two kinds,	742
1065a. Challenges should be specific,	742
1066. Impaneling the jury—Mode of procedure,	743
1067. Stating the issues of fact to the court and jury,	743
1068. State rules of evidence control in federal courts,	744
1069. Competency of witnesses—State law controls,	745
1070. Subpoenas for witnesses—One hundred mile limit,	745
1071. Witnesses must testify orally in open court—Exceptions—Controlled exclusively by federal statutes,	745
1072. Same—Depositions <i>de bene esse</i> cannot be read if presence of witness can be procured,	748
1073. Mode of taking depositions <i>de bene esse</i> —Either federal or state statutes may be followed,	748
1074. Motions to suppress depositions—Should be opportunely made,	748
1075. Surgical examination of plaintiff in personal injury suits without his consent,	749
1076. Same—Surgical examination does not contravene rule requiring oral testimony in open court,	750

TABLE OF CONTENTS.

xix

§ 1077. Cross-examination of witnesses confined to matters of direct examination—Exceptions to the rule,	750
1078. Documentary evidence—Legislation of congress,	751
1079. Statutory power of federal courts to compel production of books and writings in evidence in trials at law,	751
1080. Same—The requisite procedure to obtain the order for production,	752
1081. Same—Shall the production be at or before trial?	753
1082. Same—Limitations upon the power to compel production,	753
1083. Same—Same—Immunity statutes,	754
1084. Subpœna <i>duces tecum</i> —Power of federal courts to issue,	754
1085. Same—Same—To obtain original papers in the general land office,	755
1086. Introduction of evidence—Order of proof,	756
1087. Objections to the admission of evidence—Must be specific,	756
1088. Same—Objections not specified are waived,	757
1089. Same—When the objection should be made,	758
1090. Demurrer to the evidence,	759
1091. Province of court and jury, respectively, in trials at common law,	760
1092. The court not controlled by state constitutions and laws as to the manner of instructing juries,	761
1093. Duty of the court to submit all issues of fact to the jury,	762
1094. Duty of the court to charge the law of the whole case, ..	763
1095. Requested instructions—Sound and erroneous propositions asked in the aggregate,	763
1096. Court not required to submit special issues to the jury,	764
1097. Peremptory instructions,	764
1098. Same—Existence of negligence or contributory negligence a question for the jury,	764
1099. Same—Motion for peremptory instruction should not be made till evidence closes,	765
1100. Duty of federal courts to give in charge the law of the state to the jury,	765
1101. Same—Must maintain the supremacy of the federal constitution,	766
1102. Withdrawal of the jury from the bar to deliberate upon their verdict,	767
1103. The verdict of the jury—Either general or special,	768
1104. Same—Special verdict, defined and practice on it stated,	769
1105. Same—Same—Distinction between a special verdict at common law, and special issues under state statutes, ..	770
1106. Same—A “special case” defined,	771
1107. Same—Same—“Special Case” and “Agreed Case” recognized as proper procedure in the federal courts,	772
1108. The verdict must find all the material issues of fact,	773
1109. Same—The federal rule accords with the common law rule,	774
1110. The legal effect of verdicts determined by state law,	774

§ 1111. Writs of inquiry,	775
1112. Amending the verdict,	776
1113. Same—"Manifest intent of the jury,"	777
1114. Defects cured by verdict—Common law rule,	777
1115. Motion in arrest of judgment,	778
1116. Motions for judgment <i>non obstante verdicto</i> , and repleader —Distinction,	778
1117. New trials—Authority of the federal courts to grant,	779
1118. Same—Not controlled by rules of state procedure,	780
1119. Same—Same—When state law gives new trial in eject- ment,	780
1120. Same—It is a matter of right to make a motion for a new trial,	781
1121. Same—Granting or refusing rests in discretion of the trial court,	782
1122. Same—When the motion for new trial must be filed,	782
1123. Same—Reasons for granting new trial,	783
1124. The judgment—Controlled by state laws,	783
1125. Same—Lien of judgments of the United States courts,	784
1126. Same—Federal court clerks to keep index of judgments, ..	785
1127. Execution—State remedies in force on December 1, A. D. 1873—State remedies subsequently adopted by federal courts,	785
1128. Same—Executions to run in all districts of a state,	786
(b) TRIAL BY THE COURT WITHOUT THE INTERVENTION OF A JURY.	
1129. Procedure in trials by the court,	786
1130. Same—Analysis of the procedure,	787
1131. The stipulation waiving a jury,	788
1132. What questions of law may be raised on the trial and re- viewed on writ of error,	789
1133. Same— <i>Obiter dictum</i> of Mr. Justice Bradley,	791
1134. The practice and procedure stated by Mr. Justice Miller, ..	791
1135. Requisites of a special finding by the court,	792
1136. The special finding should be "spread at large upon the record,"	793
1137. Nonsuit upon the trial,	794

CHAPTER XXX.

BILLS OF EXCEPTIONS TAKEN TO THE DECISIONS AND RUL- INGS OF THE COURT UPON THE TRIAL OF SUITS AT COM- MON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

1138. Bills of exceptions defined,	796
1139. Preparing the cause for review upon writ of error,	797
1140. Rulings upon the trial must be excepted to at the time they are made,	798

§ 1141. Errors apparent upon the record, not requiring a bill of exceptions,	800
1142. Bills of exceptions to the admission of evidence,	801
1143. Bills of exception to the exclusion of evidence,	801
1144. Exceptions to the ruling of the court in giving and refusing instructions to the jury—When taken,	802
1145. Exceptions to the court's charge must be specific—Counsel must except "Distinctly and Severally,"	804
1146. Requested charges—When the general charge of the court covers the entire case,	806
1147. Same—A series of instructions presented as one request, ..	806
1148. Same—Exception to the portion of the court's charge which is variant from requested charge,	807
1149. Bills of exception taken to the rulings of the court in giving and refusing instructions—What to contain,	807
1150. Same—Same—Supreme court rule,	808
1151. Same—How much of the evidence should be set out in bill of exceptions—General rule,	809
1152. Authentication of bills of exceptions,	809
1153. Mandamus to compel the trial judge to settle and sign a bill of exceptions,	810
1154. Order giving time to prepare a bill of exceptions,	810

CHAPTER XXXI.

THE WRIT OF ERROR FOR THE REVIEW OF THE FINAL JUDGMENTS OF THE CIRCUIT COURTS OF THE UNITED STATES IN SUITS AT COMMON LAW.

1155. Judgments in suits at common law reviewed upon writ of error only,	811
1156. Application for the writ,	812
1157. When and by what judges allowed,	812
1158. By what clerks issued,	812
1159. Service of the writ of error,	813
1160. Return of the writ of error,	813
1161. Service of citation in error—Return,	813
1162. Time within which writ of error must be sued out,	813
1163. Reference to a discussion of writs of error in a previous chapter,	814

FEDERAL PROCEDURE AT LAW.

CHAPTER XV.

THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES.

(a) STATEMENT OF SOME GENERAL PRINCIPLES INTRODUCTORY TO THIS CHAPTER.

- § 653. The circuit courts have no appellate jurisdiction.
654. Same—Exception—Review of the decisions of the Board of general appraisers of merchandise.
655. The circuit court the great court of original jurisdiction.
656. Extent of the judicial power—A great political principle.
657. Same—A new political principle established by the constitution.
658. Distinction between judicial power and jurisdiction.
659. Jurisdiction defined.
660. Same—Continues until the judgment is satisfied.
661. Power to issue writs necessary for the exercise of jurisdiction.
662. Same—Writs of injunction in aid of jurisdiction.
663. The jurisdiction of the federal courts defined by federal legislation.
664. Same—Four great federal judiciary acts.
665. The jurisdiction of the circuit courts is either concurrent or exclusive.

666. Object and purposes of this chapter.

- § 667. Same—The word “concurrent”—Its broad significance in the federal judiciary acts.

(b) THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES CONCURRENT WITH THE COURTS OF THE SEVERAL STATES.

668. Jurisdiction of suits arising under the constitution, laws and treaties of the United States.

669. Same—Defined.

670. Same—Same—Cause of action must depend on construction and application of the constitution, law, or treaty.

671. Same—Same—Jurisdiction must appear from plaintiff's own statement of his claim.

672. Same—Same—Averment of frivolous constitutional question.

673. Same—Constituent elements of the jurisdiction.

674. Same—Same—Same—The facts must be pleaded.

675. Same—Three classes of cases arising under this head of federal jurisdiction.

- § 676. Suits arising under the constitution — Not susceptible of classification.
677. Same—State laws "impairing the obligation of contracts."
678. Same — Same — Contracts made by state.
679. Same—Same—Same—The Virginia tax and coupon cases.
680. How a suit in equity may arise under the federal constitution.
681. Same—Suit in equity to enjoin unconstitutional sale of property for taxes.
682. Same—Suit in equity to protect land grant to railroad company.
683. Same — Restraining state officers from executing unconstitutional statute.
684. Same — Restraining state officers from wrongful administration of valid state statutes.
685. Same—May arise under any constitutional provision securing a right.
686. Municipal ordinances as laws "impairing the obligation of contracts"—Suits to enjoin.
687. Suits at law arising under the federal constitution.
688. Same—Action of trespass against state officers for seizure of property under unconstitutional state statutes.
689. Same — Same — Barry vs. Edmunds.
690. Same — Same — Scott vs. Donald.
691. Same — Same — Exemplary damages as an element in a case arising under the constitution.
- § 692. Same—Suit arising under both the constitution and a federal statute.
693. Suits arising under the laws of the United States.
694. Same—Suits on the official bonds of federal officers.
695. Same—Same—Suit on bond of United States marshal.
696. Same—Same—Suit on bond of federal court clerk.
697. Same—Suit to enforce individual liability of shareholders of liquidating national bank.
698. Same — Ejectment when plaintiff's title depends upon validity of patent from the United States.
699. Same — Ejectment when plaintiff claims title through judicial sale under federal court judgment.
700. Same — Two corporations claiming same land under different acts of congress.
701. Same—Suit to test validity of the consolidation of railroad companies under acts of congress.
702. Suits by and against federal corporations.
703. Same — Same — Rule abolished as to national banks.
704. Same—Suit against receiver of national bank.
705. Same—Suit against federal court receiver does not arise under laws of the United States.
706. Same—Suit against election officers for wrongful denial of right to vote for member of congress.
707. Suits arising under treaties of the United States.
708. Same — Treaty provisions

- removing disability of alien to take and hold lands.
- § 709. Jurisdiction based on diversity of citizenship.
710. Same—Not residence, but citizenship.
711. Same — Territories not states within the meaning of the federal constitution and judiciary acts.
712. Same—Corporation created by a state a citizen thereof.
713. Same — Same — Incorporation in more than one state.
714. Same—Citizenship of national banks for purposes of jurisdiction.
715. Same—A state not a citizen.
716. Same—Same—Suit brought by state on relation of a party.
717. Same—Persons standing in a fiduciary relation suing or sued.
718. Same—Suit by assignee of chose in action.
719. Same—Same—Bill for specific performance.
720. Same — Same — Exceptions —Notes of corporations payable to bearer.
721. Same—Same—Foreign bills of exchange.
722. Same—Same—The fact of assignment.
723. Same — Several plaintiffs and defendants.
724. Jurisdiction of suits between citizens of a state and foreign states, citizens or subjects.
725. Same—Corporation created by a foreign state a citizen thereof.
726. Jurisdiction of suits in which the United States are plaintiffs.
- § 727. Jurisdiction founded on claim to lands under grant of different states.
728. The amount in dispute—In what class of cases the jurisdictional sum or value of two thousand dollars is necessary to maintain jurisdiction.
729. Same—Rules for determining the amount in dispute.
730. Same — Same — Rule when amount is to be determined from the face of a pleading.
731. Same — Same — Same — Cases justifying exemplary damages.
732. Same — Same — Rule when amount is to be determined upon an issue of fact.
733. Same — Same — Rule when there are several parties, plaintiffs or defendants.
734. Same—Same—When interest is a principal demand, and when an accessory demand.
735. Same — The jurisdictional amount not required in ancillary suits.
736. Jurisdiction once vested is not ousted by subsequent events.
- (c) THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES UNDER SPECIAL STATUTES.
737. Suits at common law by the United States or officers thereof.
738. Same—Suits by receivers of national banks.
739. Same—Action of debt on postmaster's bond.

- § 740. Suits at law or in equity arising under the revenue laws.
741. Same—Revenue laws defined.
742. Same—Suit in equity to enforce internal revenue tax lien.
743. Suits arising under the postal laws.
744. Same — Suits to recover money wrongfully or fraudulently paid out by postoffice department.
745. Same—Suits in equity to set aside fraudulent conveyances.
746. Suits for recovery of penalties for violation of laws regulating carriage of passengers in merchant vessels.
747. Condemnation of property used in aid of insurrection.
748. Suits arising under laws relating to slave trade.
749. Suits by assignees of debentures.
750. Suits arising under the patent laws of the United States.
751. Same—Defined.
752. Same—Bill in equity to enjoin infringement.
753. Same—Same—Bill for naked accounting not maintainable.
754. Same — Trespass on the case for infringement.
755. Same—Suits arising out of contracts in relation to patents.
756. Same—Suits to enjoin collection of taxes levied on patent rights.
757. Suits arising under the copyright laws of the United States.
- § 758. Same—Jurisdiction of district courts in suits to recover penalties.
759. Same—Action of debt for penalties.
760. Suits by the United States or officers against national banking associations.
761. Suits by national banks to enjoin the comptroller of the currency.
762. Suits for injuries done under the revenue laws of the United States.
763. Suits to enforce the right of citizens to vote.
764. Suits to redress deprivation of rights secured by the constitution and laws of the United States.
765. Suits for injuries resulting from conspiracies in violation of the "civil rights" act.
766. Same—Suits against persons having knowledge of such conspiracies.
767. Suits by and against trustees in bankruptcy.
768. Proceedings by the federal government to condemn private property for public use.
769. Suits against the government under "the Tucker act."
770. Actions of debt for penalties under laws prohibiting importation of foreigners under contract to labor.
771. Jurisdiction of suits under the act to prevent unlawful occupancy of the public lands.
772. Suits for partition when United States are one of tenants.

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|---|---|
| <p>§ 773. Seizure and destruction of obscene books, pictures and other articles imported from foreign countries in violation of law.</p> <p>774. Suits in equity and actions at law arising under the acts of congress, to protect trade and commerce against unlawful restraints and monopolies.</p> <p>775. Same—Suits for injunction can be brought only by the United States.</p> <p>776. Same—The damages must be recovered by direct suit and not by set-off.</p> <p>777. Same—Applies to common carriers by railway — Suits to annul illegal traffic arrangements.</p> | <p>§ 778. Same — Same — Consolidation of capital stock of competing lines in holding company for purpose of joint control—Suit to enjoin.</p> <p>779. Same—Combinations in restraint of trade among states, in articles of commerce—Injunction.</p> <p>780. Suits under the act to regulate commerce.</p> <p>781. Same—Rate-making power vested in the commission—Suits to enjoin orders of commission.</p> <p>782. Jurisdiction to naturalize aliens as citizens of the United States.</p> <p>783. No jurisdiction in original mandamus proceedings.</p> |
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(a) A STATEMENT OF SOME GENERAL PRINCIPLES INTRODUCTORY TO THIS CHAPTER.

§ 653. The circuit courts have no appellate jurisdiction.—Under the present arrangement of the federal judicial system, the circuit courts of the United States have and exercise no appellate jurisdiction; they are not appellate courts, but courts of original jurisdiction only. The original judiciary act and subsequent legislation vested the circuit courts with appellate jurisdiction, with some limitations, over the final judgments and decrees of the district courts in both civil ¹ and criminal ² causes, and which continued until within recent years, but was entirely taken away by the fourth section of the act establishing the United States circuit courts of appeals, which provides: “That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be ex-

¹ U. S. Stat. at L. ch. 20, secs. 21, 22, 23, 24, pp. 73, 79; 2 U. S. Stat. at L. ch. 40, p. 240; 10 U. S. Stat. at L. ch. 80, p. 163; 13 U. S. Stat. at L. ch. 174, p. 310; 17 U. S. Stat. at L. ch. 255, p. 196; U. S.

Rev. Stat. secs. 631–636; 4 Fed. Stat. Anno. 251–253.

² 20 U. S. Stat. at L. ch. 176, secs. 1, 2, 3, p. 354; 4 Fed. Stat. Anno. 254–355.

exercised or allowed by said existing circuit courts, but all appeals by writ of error, or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit courts of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeal hereby established according to the provisions of this act regulating the same.”³

§ 654. Same—Exception—Review of the decision of the board of general appraisers of merchandise.—There is one exception to the rule that the circuit courts can exercise no appellate jurisdiction. Those courts are vested with power to review and revise the decision of the Board of General appraisers of merchandise, appointed by the president under the revenue laws; and although the board of appraisers is not, technically, a court, and the proceedings for review are not denominated by the statute authorizing them as an appeal, yet it is such in substance.⁴

§ 655. The circuit court the great court of original jurisdiction.—The circuit courts of the United States are the great courts of original jurisdiction in the federal judicial system; they are now, and have been, ever since the foundation of the government, the federal courts of original common law and equity jurisdiction, concurrent with the courts of the several states, whether by original institution or removal, in so far as that jurisdiction has been distributed by congress; they also exercise a broad and extensive original jurisdiction, both civil and criminal, exclusive of the state courts, and, in part, exclusive of all other federal courts; and, in the exercise of this great and multiform jurisdiction, the circuit courts are called on to interpret and administer not only the constitution and laws of the United States, but also the laws of the several states, and the principles of common law and equity jurisprudence, and, in many in-

³ 29 U. S. Stat. at L. ch. 517, sec. 4, p. 826; 4 Fed. Stat. Anno. pp. 397, 398.

⁴ 26 U. S. Stat. at L. ch. 407, sec. 15, pp. 131, 138; 2 Fed. Stat. Anno. pp. 627, 628; U. S. v. Lies,

170 U. S. 628-637 (42:1170); U. S. v. Passavant, 169 U. S. 16-26 (42:644); Bank v. U. S., 175 U. S. 37-40 (44:64); Rothschild & Brother v. U. S., 179 U. S. 463-471 (45:277).

stances, the rules and principles of international law.⁵ There is no court known to the history of jurisprudence vested with a more complex and comprehensive original jurisdiction, than the circuit courts of the United States.

§ 656. **Extent of the judicial power—A great political principle.**—The founders of our government recognized and acted in obedience to the great political principle that, in every well-constructed government, the powers of the three great departments—the legislative, the executive and the judicial—are, and of necessity must be, co-extensive with each other; and the constitutional provision, declaring “that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority,” enables the judicial department to receive jurisdiction to the full extent of the constitution, laws and treaties, whenever a case arising under the constitution or a law or a treaty is submitted to the appropriate judicial tribunal in the manner and form prescribed by law; and the jurisdiction in such case is not defeated because it may involve other questions depending upon the general principles of law.⁶

⁵ 1 U. S. Stat. at L. ch. 20, pp. 73-79; 18 U. S. Stat. at L. ch. 137, pp. 470-473; 25 U. S. Stat. at L. ch. 866, p. 433; U. S. Rev. Stat. sec. 629, 711, 721; 26 U. S. Stat. at L. ch. 647, p. 209; 24 U. S. Stat. at L. ch. 104, p. 379; 25 U. S. Stat. at L. ch. 382, p. 855; *Wayman v. Southard*, 10 Wheat. 1-49 (6:253); *Ross v. Duval*, 13 Pet. 60 (10:58); *Wright v. Bales*, 2 Black, 537 (17:265); *Williamson v. Suydam*, 6 Wall. 723 (18:967); *Beauregard v. New Orleans*, 18 How. 497 (15:469); *St. John v. Chew*, 12 Wheat. 153 (6:583); *Thatcher v. Powell*, 6 Wheat. 119 (5:221); *Eacon v. Insurance Co.*, 131 U. S. 258 (33:128); *Halstead v. Buster*, 140 U. S. 273 (35:484); *Hanrick v. Patrick*, 119 U. S. 156 (30:396); *Ridings v. Johnson*, 128 U. S. 212

(32:401); *Warburton v. White*, 176 U. S. 484 (44:555).

⁶ *Cohens v. Virginia*, 6 Wheat. 264-448 (5:257); *Osborn v. Bank of the United States*, 9 Wheat. 739-903 (6:204); *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233, 1268); *Federalist No. LXXX*. In *Cohens v. Virginia*, *supra*, Chief Justice Marshall, discussing the principle stated in the text, said:

“While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the construction which the words of the instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go

§ 657. Same—A new political principle established by the constitution.—The federal constitution, in defining the extent and limits of the judicial power of the general government, exceeded the limits of the old political principle which requires

to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for the plaintiffs in error, is, that the judicial power of every well constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the constitution and laws.

"If any proposition may be considered a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say, that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative, merely because it is fit that it should be so; but we mean to say that, this fitness furnishes an argument in construing the constitution which ought never to be overlooked, and which is most especially entitled to consideration, when we are inquiring, whether the words of the instrument which purport to establish this principle, shall be contracted for the purpose of destroying it."

In *Osborn v. Bank*, *supra*, the chief justice, discussing the constitutionality of the clause in the act incorporating the bank, authorizing it to sue in the federal

courts, states the doctrine as follows:

"In support of this clause, it is said that the legislative, executive, and judicial powers of every well-constructed government, are co-extensive with each other; that is, they are potentially co-extensive. The executive department may constitutionally execute every law which the legislature may constitutionally make, and the judicial department may receive from the legislature the power of construing every such law. All governments which are not extremely defective in their organization, must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole executive power in the president; and the third article declares, 'that the judicial power shall extend to all cases in law and equity, arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.'

"This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. The power is capable of

the legislative, executive and judicial powers to be co-extensive with each other, and embraced large classes of cases determinable by the character of the parties, not arising under the constitution, laws, or treaties of the United States, but arising under the local laws of the several states, or under the general principles of the common law, or equity jurisprudence, and involving no federal question. Inasmuch as the formation of a more perfect union, the establishment of justice, and the insuring of domestic tranquility were among the chief objects of the constitution, and local jealousies and prejudices were existing evils to be overcome in the attainment of those great ends, it was provided in that instrument that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state,"⁷ and that "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states,"⁸ and the judicial power of the general government was extended to controversies to which the United States shall be a party, between two or more states, between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between citizens of a state and foreign states, citizens, or subjects.⁹ This extension of the judicial power beyond the limits of the axiom of the old political systems was deemed necessary for the harmonious operation of the new government to be established.¹⁰

§ 658. Distinction between judicial power and jurisdiction. There is a clear and radical distinction between judicial power and jurisdiction. Judicial power is a sovereign power, inherent in all nations, and co-ordinate and co-extensive with the legis-

acting only when the subject is submitted to it by a party who asserts his right in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws and treaties of the United States."

In the Federalist it is said: "If there are such things as political axioms, the propriety of the judicial power of a government be-

ing co-extensive with its legislative power, may be ranked among the number. The mere necessity of uniformity in the interpretation of the national laws, decides the question." No. LXXX.

⁷ U. S. Const. art. IV, sec. 1.

⁸ U. S. Const. art. IV, sec. 2.

⁹ U. S. Const. art. III, sec. 2; XI art. of Amdt.; Federalist Nos. LXXX, LXXXII.

¹⁰ Federalist No. LXXX.

lative and executive powers; jurisdiction is the authority vested by law in a judicial tribunal to exercise judicial power in particular classes of cases. The judicial power of the United States is that sovereign power, not inherent in them, but delegated to them in the federal constitution, by which they are able to hear and determine causes and render and execute judgments, between parties, in the classes of cases enumerated in that instrument; and the jurisdiction of the courts of the United States is the authority vested in them, respectively, by the constitution and laws, to exercise judicial power, original or appellate, in the classes of cases committed to them, each, respectively. The power is a sovereign power, but the courts are not sovereign; they are merely the agents and organs of sovereignty, through which the judicial power is exercised. The supreme court was created by and derives its jurisdiction directly from the constitution. The other courts of the system were established by the congress, pursuant to the constitution, and receive their jurisdiction mediately from that instrument.¹¹

§ 659. **Jurisdiction defined.**—The jurisdiction of a court is its authority to hear and determine a case between parties, and to render a judgment or decree and to execute it.¹²

§ 660. **Same—Continues until the judgment is satisfied.—Execution.**—The jurisdiction of a court is not exhausted by the rendition of judgment, but continues until that judgment shall be satisfied; and the fourteenth section of the original judiciary act which gives the courts of the United States power to issue all writs “which may be necessary to the exercise of their respective jurisdictions” vests those courts, respectively, with power to issue executions on their judgments.¹³

¹¹ *Cohens v. Virginia*, 6 Wheat. 264 (5:257); *Osborn v. Bank*, 9 Wheat. 739 (6:204); *Wayman v. Southard*, 10 Wheat. 1-49 (6:253); *Martin v. Hunter's Lessees*, 1 Wheat. 304 (4:97); *Sheldon v. Sill*, 8 How. 441 (12:1147); *Turner v. Bank*, 4 Dall. 10 (1:718); *Cary v. Curtis*, 3 How. 236 (11:576); *Grover Co. v. Florence Co.*, 18 Wall. 553-587 (21:914); *Rhode Island v. Massachusetts*, 12 Pet.

657 (9:1233); *Federalist* Nos. LXXX, LXXXI, LXXXII.

¹² *U. S. v. Arredondo*, 6 Pet. 601 (8:547); *Rhode Island v. Massachusetts*, 12 Pet. 657 (9:1233); *Wayman v. Southard*, 10 Wheat. 1-49 (6:253); *Slater v. Mexican Cent. R. Co.*, 194 U. S. 120-135 (48:900).

¹³ *Wayman v. Southard*, 10 Wheat. 1-49 (6:253); *Knox County v. Aspinwall*, 24 How. 376, 386 (16:735); *United States v. John-*

§ 661 Power to issue writs necessary for the exercise of jurisdiction.—The fourteenth section of the original judiciary act, which is still in force, invested the supreme court and the circuit and district courts with power to issue writs of *scire facias*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.¹⁴ This statute was enacted under and by virtue of the constitutional provision giving to congress the power to make all laws which shall be necessary and proper for carrying into execution all the powers vested by that instrument in the government of the United States, or in any department or officer thereof; and the authority given to the courts by the statute under consideration is not limited to the issuance of original or mesne process or process anterior to final judgment, but authorizes the issuance of all such writs after final judgment as may be necessary and appropriate to the beneficial exercise of the jurisdiction of the courts, and to render their judgments effectual.¹⁵ The words, “agreeable to the principles and usages of law,” contained in the statute, embraced not only such writs as were sanctioned by the principles and usages of the common law, but also such writs as were, at the time of the passage of the act, in use in the state courts and not conformable to the common-law writs.¹⁶ Under this statute, it is well established that a circuit court may issue a writ of mandamus to compel the officers of a county, city, or town, to levy a tax to pay and satisfy a judgment previously rendered against it in such court.¹⁷

son, 6 Wall. 198 (18:777); *Bank v. Stevens*, 169 U. S. 432-465 (42:807); *Bank v. Halstead*, 10 Wheat. 51 (6:264); 4 Fed. Stat. Anno. 498-506.

¹⁴ 1 U. S. Stat. at L. ch. 20, sec. 14, pp. 73-79; U. S. Rev. Stat. sec. 716; 4 Fed. Stat. Anno. 498-506.

¹⁵ *Wayman v. Southard*, 10 Wheat. 1-49 (6:253); *Bank v. Halstead*, 10 Wheat. 51 (6:264).

¹⁶ *Bank v. Halstead*, 10 Wheat. 51 (6:264).

¹⁷ *Knox County v. Aspinwall*, 24 How. 384 (16:738); *Riggs v.*

Johnson County, 6 Wall. 187 (18:733); *Supervisors v. United States*, 9 Wall. 415-419 (19:732); *Mayor v. Lord*, 9 Wall. 409-414 (19:704); *United States v. Quincy*, 4 Wall. 431, 435 (18:403); *Walkley v. Muscatine*, 6 Wall. 481-484 (18:930); *Supervisors v. United States*, 4 Wall. 435-447 (18:419); *Chanute v. Trader*, 132 U. S. 210-214 (33:345); *United States v. Knox County*, 122 U. S. 306-320 (30:1152); *United States v. Lee County*, 6 Wall. 210-213 (18:781); *Memphis v. Brown*, 97 U. S. 300-

§ 662. Same—Writs of injunction in aid of jurisdiction.—Notwithstanding the statutory inhibition that “the writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a state, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy,”¹⁸ yet, nevertheless, when a circuit court of the United States has acquired jurisdiction over a cause, either by its having been originally instituted in it, or removed to it from a state court, such circuit court may issue writs of injunction, including writs to stay proceedings in state courts, in aid of and to protect its own jurisdiction, and to enforce its own orders, judgments and decrees, and may restrain all proceedings in a state court which would have the effect of defeating or impairing its own jurisdiction.¹⁹

§ 663. The jurisdiction of the circuit courts defined by federal legislation.—The circuit courts have been created and their jurisdiction conferred and defined by federal legislation, pursuant to a constitutional grant of power; and to this legislation alone we must look for an enumeration of the classes of controversies of which they have been given cognizance. It is true that the entire mass of judicial power vested in the federal

(24:924); *Galena v. Amy*, 5 Wall. 705 (18:560); *Butz v. Muscatine*, 8 Wall. 575 (19:490); *Rees v. Wattertown*, 19 Wall. 107 (22:72); *Heine v. Levee Com'rs*, 19 Wall. 655 (22:223); *East St. Louis v. United States*, 120 U. S. 600 (30:798).

¹⁸ U. S. Rev. Stat. sec. 720; 4 Fed. Stat. Anno. p. 509; 1 U. S. Stat. at L. ch. 22, sec. 5, pp. 334, 335.

¹⁹ *Julian v. Central Trust Co.*, 193 U. S. 93-114 (48:629); *Sharon v. Terry*, 36 Fed. R. 365, 1 L. R. A. 572; *Fest v. Union Pac. R. Co.*, 10 Blatch. 520, Fed. Cas. 4,830; *French v. Hay*, 22 Wall. 250 (22:587); *Dietzsch v. Huldekoper*, 103 U. S. 494 (26:497); *Wagner v. Drake*, 31 Fed. R. 851; *Hamilton v. Walsh*, 23 Fed. R. 420; *Garner*

v. Second Nat. Bank, 67 Fed. R. 833; *President of Bowdoin College v. Meritt*, 59 Fed. R. 6; *Heinsley v. Myers*, 45 Fed. R. 283; *Fidelity Ins. Trust and Safe Deposit Co. v. Norfolk & W. R. Co.*, 88 Fed. R. 815-821; *Terre Haute & I. R. Co. v. Peoria & P. U. R. Co.*, 82 Fed. R. 943; *Trust Co. v. Railway Co.*, 109 Fed. R. 3; *Railway Co. v. Scott*, 13 Fed. R. 795; *Stewart v. Wisconsin Cent. R. Co.*, 117 Fed. R. 782; *Trust Co. v. Railway Co.*, 59 Fed. R. 385; *State Trust Co. v. Kansas City R. Co.*, 110 Fed. R. 10; *Garner v. Bank*, 67 Fed. R. 833; *Baltimore R. Co. v. Ford*, 35 Fed. R. 170; *Freshman v. Insurance Co.*, 41 Fed. R. 449; *Abeel v. Culberson*, 56 Fed. R. 329; 1 *Bates*, Fed. Eq. Proc. sec. 541; 4 Fed. Stat. Anno. pp. 510-512.

government has its origin in the constitution; but the duty of creating the inferior courts, organizing the judicial system, and distributing the jurisdiction, was confided by that instrument to congress;²⁰ and the circuit courts, having been ordained and established, and their jurisdiction defined, the judicial power as defined in the constitution became operative through them to its full extent over the subjects of jurisdiction confided to them.²¹

§ 664. **Same—Four great federal judiciary acts.**—Since the establishment of the federal government, there have been enacted, by congress, four great federal judiciary acts, affecting the organization of the federal judiciary, and distributing the judicial power of the government and defining the jurisdiction of the several courts of the system; and to these acts and their various amendments, together with a large number of special statutory enactments, we must look for a statement and enumeration of the various classes of cases of which the circuit courts have jurisdiction.²²

§ 665. **The jurisdiction of the circuit courts is either concurrent or exclusive.**—The jurisdiction of the circuit courts of the United States in civil causes is either (1) concurrent with the courts of the several states or (2) exclusive of the state courts; and that part of its jurisdiction which is exclusive of the state courts is either (1) concurrent with the United States district courts, or (2) exclusive of such courts.²³

§ 666. **Object and purposes of this chapter.**—The object and purposes of this chapter are, to state in concise form, (1) the common law and equity jurisdiction of the circuit courts of the United States concurrent with the courts of the several states, and (2) the common law and equity jurisdiction of the circuit courts exclusive of the state courts, and (3) to show in what

²⁰ *Carey v. Curtis*, 3 How. 236 (11:576); *Turner v. Bank*, 4 Dall. 10 (1:718); *Sheldon v. Sill*, 8 How. 441 (12:1147); *Grover Co. v. Florence Co.*, 18 Wall. 553-587 (21:914).

²¹ *Osborn v. Bank*, 9 Wheat. 739 (6:204).

²² 1 U. S. Stat. at L. ch. 20, pp. 73-79; 18 U. S. Stat. at L. ch. 137,

pp. 470-473; 25 U. S. Stat. at L. ch. 866, pp. 433, 434; 26 U. S. Stat. at L. ch. 517, pp. 826-828; U. S. Rev. Stat. secs. 629, 711; 4 Fed. Stat. Anno. pp. 245-397; 1 U. S. Comp. Stat. 1901, pp. 501-517, 577, 578.

²³ See statutes cited in section next preceding.

particulars the common law and equity jurisdiction of the circuit courts is concurrent with and in what particulars it is exclusive of the United States district courts.

§ 667. **Same**—The word “concurrent”—Its broad significance in the federal judiciary acts.—The word “concurrent,” used in the federal judiciary acts, is a word of very broad and comprehensive meaning; it derives its peculiar force from the circumstance that it was selected by congress at its first session under the constitution, and has been adhered to ever since, in the enactment of statutes distributing the judicial power of the government, as the word *apposite* to an accurate expression of the true limits of that judicial power, in its application to cases at law and in equity; and it has, by long legislative usage and frequent judicial construction, acquired a permanent place in the language of federal law and jurisprudence, and is of constantly recurring importance in determining the limits of the original jurisdiction of the circuit courts of the United States, and especially in suits affecting personal and property rights of parties arising under state legislation.

The judicial power of the United States, which, by the very words of the constitution, extends “to all cases in law and equity” of the classes in that instrument enumerated, is not limited to suits which the common law recognized among its old and settled proceedings, nor to suits upon causes of action originating in the common law, nor to suits in equity recognized among the old and settled equitable remedies based upon the general principles of equity jurisprudence, nor to cases in law and equity arising under the constitution, laws and treaties of the United States, but it extends also to new causes of action, either legal or equitable, created by the statutes of the several states; and whenever, by virtue of a state statute, the courts of law and equity of that state are vested with jurisdiction of a suit between parties plaintiff and defendant, founded on a right created by the state statute, which involves any property or claim of the parties capable of pecuniary estimation, and which is the subject of the litigation, and the respective claims of the parties to which may be presented by pleadings for judicial determination, the federal courts, sitting in the state where such statute exists, are, by the federal judiciary acts, vested with jurisdiction, concurrent with the courts of the state, over

such suits, between proper parties and involving the requisite jurisdictional amount or value. The constitutional provision extending the judicial power of the general government to controversies between citizens of different states had its origin in the conviction of the founders of the government, that state attachments and state and local prejudices might injuriously affect the regular administration of justice in the state courts, when the opposing parties should be citizens of different states, and that adequate protection against such influences would be secured by allowing to the plaintiff an election of courts before suit, and when the suit is brought in the state court, a like election afterward, by the defendant by removal; but this protection against injustice resulting from state attachments and local prejudice could not be fully secured, unless congress should have the power to invest the federal courts with jurisdiction commensurate with the jurisdiction of the courts of the several states in all suits of a legal or equitable nature, between citizens of different states, although the right or cause of action may be created by state statute. If state legislation could create new legal and equitable rights, and exclude the federal courts from all participation in their enforcement, then the wise and judicious policy of the constitution in this respect could and would be defeated by state action; and the legislative department of the government, pursuant to the constitution and in execution of the power conferred by it, by the use of the word "concurrent" in the judiciary acts, intended to, and did vest in the circuit courts a jurisdiction co-extensive with the jurisdiction of the courts of the several states, in all suits of a legal or equitable nature, without regard to the source of the cause of action, between citizens of different states, whenever the matter in dispute is of the statutory sum or value; and it is now definitely settled that, whenever a general rule as to property or personal rights, or injuries to either, is established by state legislation, its enforcement by the federal courts in a case between proper parties and involving the requisite sum or value is a matter of course, and the jurisdiction of those courts in such cases, cannot be limited by state action.²⁴

²⁴ *Gains v. Fuentes*, 92 U. S. 10-26 (23:524); *Union Pac. Ry. Co. v. Myers*, 115 U. S. 1-25 (29:325); *Chicago & Northwestern Ry. Co.*

(b) THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES CONCURRENT WITH THE COURTS OF THE SEVERAL STATES.

§ 668. Jurisdiction of suits arising under the constitution, laws and treaties of the United States.—The circuit courts of the United States are vested with original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, without regard to the citizenship of the parties.²⁵

v. Whitton, 13 Wall. 270-291 (20:571); Boom Co. v. Patterson, 98 U. S. 403-410 (25:206); Parsons v. Bedford, 3 Pet. 433 (7:732); Brisenden v. Chamberlain, 53 Fed. R. 309; Keith v. Rockingham, 2 Fed. R. 834; Marden v. Star, 107 Fed. R. 199; Gordon v. Longest, 16 Pet. 97-103 (10:900); Dennick v. Central R. Co., 103 U. S. 11-21 (26:439); Farrell v. O'Brien, 199 U. S. 89-119.

²⁵ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433; Patton v. Brady, 184 U. S. 608-624 (46:713); Howard v. United States, 184 U. S. 676-694 (46:754); Anten v. Bank, 174 U. S. 125-149 (43:920); Bachrack v. Norton, 132 U. S. 337 (33:377); Feibleman v. Packard, 109 U. S. 421-426 (27:984); Bock v. Perkins, 139 U. S. 628-641 (35:314); Sonnentheil v. Brewing Co., 172 U. S. 401-416 (43:492); Northern Pac. Ry. Co. v. Soderberg, 188 U. S. 526-537 (47:575); Doolan v. Carr, 125 U. S. 618-642 (31:844); Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65-75 (42:79); Cook v. Avery, 147 U. S. 375-386

(37:209); Cummings v. Chicago, 188 U. S. 410-431 (47:525); Holt v. Indiana Mfg. Co., 176 U. S. 68-73 (44:374); United States v. Sayward, 160 U. S. 493 (40:508); Vicksburg Waterworks Co. v. Vicksburg, 185 U. S. 65-83 (46:808); Swofford v. Templeton, 185 U. S. 487-494 (46:1005).

The judiciary act of March 3, 1875, was the first to invest the circuit courts of the United States with jurisdiction of suits of a civil nature, at common law or in equity arising under the constitution, laws and treaties of the United States; and the second section of that act is precisely the same as the second section of the judiciary act of March 3, 1887, as corrected by the act of Aug. 13, 1888, except that the jurisdictional amount required in the former was \$500, while in the latter it is \$2,000. See 18 U. S. Stat. at L. ch. 137, sec. 1, pp. 470-473; 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433; Tennessee v. Union & Planters' Bank, 152 U. S. 454-472, Law. Ed. 38, p. 511-513.

§ 669. **Same—Defined.**—A suit arising under the constitution or a law or a treaty of the United States, within the meaning of the federal statutes defining the original jurisdiction of the circuit courts of the United States concurrent with the courts of the several states, is a suit of a civil nature at common law or in equity, in which the plaintiff, in the statement of his cause of action, in his declaration, bill, or complaint, by the averment of facts, in legal and logical form, such as is

The case of *Osborn v. The Bank of the United States* (9 Wheat. 739) was brought in a circuit court of the United States, under a provision of the act of congress creating the Bank, authorizing the Bank "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all state courts having competent jurisdiction, and in any circuit court of the United States." It was contended by counsel in that case, that it was not competent, under the constitution, for congress to vest such jurisdiction in the circuit courts; but that contention was overruled, Mr. Justice Johnson dissenting. In delivering the opinion of the court, and vindicating the power of congress to vest in the circuit courts original jurisdiction of cases arising under the constitution, Chief Justice Marshall said:

"In those cases in which original jurisdiction is given to the supreme court, the judicial power of the United States cannot be exercised in its appellate form. In every other case, the power is to be exercised in its original or appellate form, or both, as the wisdom of congress may direct. With the exception of these cases, in which original jurisdiction

is given to this court, there is none to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the constitution. Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find, in the constitution, no prohibition to its exercise, in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only, to the most important class of cases to which it is applicable. The constitution establishes the supreme court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance, in the courts of the Union, but must first be exercised in the tribunals of the state; tribunals over which the government of the Union has no adequate control, and which may

required by good pleading, sets up and claims a title, right, privilege, or immunity, under the constitution or a law or a treaty of the United States, the correct judicial determination of which depends upon the application and construction of the constitution or law or treaty, and which will be defeated by one construction and will be sustained by the opposite construction.²⁶

§ 670. Same—Same—Cause of action must depend on construction and application of the constitution, law, or treaty.—In this class of cases, it is necessary to the exercise of original jurisdiction by the circuit courts, that plaintiff's cause of action should depend upon the construction and application of the constitution or a law or a treaty of the United States.²⁷

be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained, that congress is incapable of giving the circuit courts original jurisdiction, in any case to which the appellate jurisdiction extends."

²⁶ *Tennessee v. Union & Planters Bank*, 152 U. S. 454-472 (38:511); *Metcalf v. Watertown*, 128 U. S. 586-590 (32:543); *Cable Co. v. Alabama*, 155 U. S. 482-488 (39:231); *Hanford v. Davies*, 163 U. S. 273-280 (41:157); *Railroad Co. v. Steele*, 167 U. S. 659-664 (42:315); *Railway Co. v. Lewis*, 173 U. S. 457-460 (43:766); *Mining Co. v. Turck*, 150 U. S. 138-144 (37:1030); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185-191 (46:144); *Blackburn v. Mining Co.*, 175 U. S. 571-588 (44:276); *Mining Co. v. Rutter*, 177 U. S. 505-514 (44:864); *Filhiol v. Maurice*, 185 U. S. 108-111 (46:827); *Devine v. Los Angeles*, 202 U. S. 313-339 (50:1046); *Boston*

Mining Co. v. Montana Ore Co., 188 U. S. 632-645 (47:626); *Joy v. St. Louis*, 201 U. S. 332-343 (50:776); *Catholic Missions v. Missoula County*, 200 U. S. 118-130 (50:398); *Arbucker v. Blackburn*, 191 U. S. 405-415 (48:239); *Defiance Water Co. v. Defiance*, 191 U. S. 184-195 (48:140); *Spencer v. Duplan Silk Co.*, 191 U. S. 526-532 (48:287).

²⁷ *New Orleans v. Benjamine* 153 U. S. 411-435 (38:764); *Defiance Water Co. v. Defiance*, 191 U. S. 184-195 (48:140); *McCain v. Des Moines*, 174 U. S. 168-181 (43:936); *Shreveport v. Cole*, 129 U. S. 36 (32:589); *Starin v. New York*, 115 U. S. 248-257 (29:388); *Little Gold Wash & W. Co. v. Keys*, 96 U. S. 199 (24:656).

In *Defiance Water Co. v. Defiance*, supra, Chief Justice Fuller, delivering the opinion of the court, said:

"We have repeatedly held—that when a suit does not really and substantially involve a dispute or controversy as to the effect or

§ 671 ~~Same—Same—~~**Jurisdiction must appear from plaintiff's own statement of his claim.**—The rule is firmly established, that a suit does not arise under the constitution or a law or a treaty of the United States, unless it involves a real and substantial dispute or controversy as to the effect or construction of the constitution or a law or a treaty of the United States, upon the determination of which the result depends; and, in order to give the circuit court jurisdiction of a case so arising, it must appear from plaintiff's own statement of his own cause of action in his declaration, bill or complaint, that the case does so arise, and such statement cannot be aided by averments setting up the defense which the defendant may interpose. The question whether the plaintiff claims a right, title, privilege or immunity under the constitution or a law or a treaty of the United States must be determined by the legal construction of his own allegations made in the statement of his own claim, and not from his allegations of the anticipated defense of the defendant; and the jurisdiction of the court must so appear at the time it is invoked, and if it does not so appear, the court upon demurrer or motion or upon its own inspection of the record must dismiss the case, and cannot retain it in order to see whether the defendant may not raise some question of a federal nature upon which the right of recovery will finally depend, and if so retained, the want of jurisdiction at the commencement of the suit cannot be supplied or cured by an answer or plea which sets up an issue or question of that kind. The plaintiff's statement of his cause of action must present a definite issue in respect to his possession of some right, title, privilege or immunity under the constitution or a law or a treaty of the United States, in such manner as to require the court to pass upon the construction of the

construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the

suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before the jurisdiction can be maintained on this ground."

constitution or law or treaty, or upon the validity of the law or treaty, in disposing of the right asserted under it.²⁸

§ 672. **Same—Same—Same—Averment of frivolous constitutional question.**—When the jurisdiction of the circuit court is invoked upon the ground that the case is one arising under the constitution of the United States, the mere averment of a constitutional question is not sufficient to give the court jurisdiction, where the question sought to be presented as the basis of the jurisdiction is so wanting in merit as to make it frivolous or without any support in reason, and the allegations of federal right are so unsubstantial and devoid of merit that they furnish no real support to plaintiff's contention.²⁹

§ 673. **Same—Constituent elements of the jurisdiction.**—In order to give the circuit court jurisdiction of a case, as one arising under the constitution or a law or treaty of the United States, it must embrace the following constituent elements, namely: (1) It must be a suit of a civil nature.³⁰ (2) It must be a suit at law³¹ or in equity,³² within the meaning of the

²⁸ *Metcalf v. Watertown*, 128 U. S. 586-589 (32:543); *Tennessee v. Union & Planter's Bank*, 152 U. S. 454-472 (38:511); *Blackburn v. Portland Gold Mining Co.*, 175 U. S. 571-588 (44:276); *Vicksburg Waterworks v. Vicksburg*, 185 U. S. 65-83 (46:808); *Muse v. Arlington Hotel*, 168 U. S. 430-437 (42:531); *Filhiol v. Maurice*, 185 U. S. 108-111 (46:827); *Boston Mining Co. v. Montana Ore Co.*, 188 U. S. 632-645 (47:626); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 85 (46:144); *Ry. Co. v. Lewis*, 173 U. S. 457 (43:766); *Colorado Cent. Mining Co. v. Turck*, 150 U. S. 138 (37:1030); *Blackburn v. Portland Gold Mine Co.*, 175 U. S. 571 (44:276); *Shoshone Mining Co. v. Rutter*, 177 U. S. 505-514 (44:864); *Divine v. Los Angeles*, 313-339 (50:1046); *Joy v. St. Louis*, 332-343 (50:776); *Catholic Mission v. Missoula County*, 200 U. S. 118-130 (50:398); *Arbuckle v. Black-*

burn, 191 U. S. 405-415 (48:239); *Defiance Water Co. v. Defiance*, 191 U. S. 184-195 (48:140); *New Orleans v. Benjamin*, 153 U. S. 411-435 (38:764); *Spencer v. Duplan Silk Co.*, 191 U. S. 526-532 (48:287).

²⁹ *Farell v. O'Brien*, 199 U. S. 89-119 (50:101).

³⁰ *Ames v. Kansas*, 111 U. S. 449-472 (28:482).

³¹ *Parsons v. Bedford*, 3 Pet. 433 (7:732); *Brisenden v. Chamberlain*, 53 Fed. R. 309; *Gordon v. Longest*, 16 Pet. 97-103 (10:900); *Dennick v. Central R. Co.*, 103 U. S. 11-21 (26:439).

³² *Robinson v. Campbell*, 3 Wheat. 212; *Boyle v. Zacharie*, 6 Pet. 658; *United States v. Howland*, 4 Wheat. 115; *Neves v. Scott*, 13 How. 271; *Story v. Livingston*, 13 Pet. 357; *Noonan v. Lee*, 2 Black, 499; *Fletcher v. Morey*, 2 Story, 555, Fed. Cas. No. 4,864.

federal constitution. (3) The matter in dispute must exceed, exclusive of interest and costs, the sum or value of two thousand dollars.³³ (4) The plaintiff must claim some title, right, privilege or immunity under the constitution or a law or a treaty of the United States.³⁴ (5) The title, right, privilege or immunity claimed by the plaintiff must be set up by him in his declaration, bill or petition, in his own statement of his own cause of action.³⁵ (6) The correct determination of the title, right, privilege or immunity set up by the plaintiff must depend on the application and construction of the constitution or a law or a treaty of the United States, and must be such that it will be defeated by one construction and sustained by the opposite construction.³⁶

§ 674. Same—Same—Same—The facts must be pleaded.—The existence of a case arising under the constitution or a law or a treaty of the United States, and the jurisdiction of the circuit court over it, must be shown and presented by pleading the facts which constitute the right and give the court cognizance of it; and an averment of conclusions of law, unsupported by a legal and logical statement of facts sufficient to establish the right claimed, and to bring it within the jurisdiction of the court, will be insufficient.³⁷ And the federal courts will not, in

³³ United States v. Sayward, 160 U. S. 493 (40:508); Fishback v. Western Union Tele. Co., 161 U. S. 96-99 (40:630); Holt v. Indiana Mnfg. Co., 176 U. S. 68-73 (44:374).

³⁴ Tennessee v. Union & Planters' Bank, 152 U. S. 454-472 (38:511); Metcalf v. Watertown, 128 U. S. 586-590 (32:543); Cable Co. v. Alabama, 155 U. S. 482-488 (39:231); Hanford v. Davies, 163 U. S. 273-280 (41:157); Railroad Co. v. State, 167 U. S. 659-664 (42:315).

³⁵ Metcalf v. Watertown, 128 U. S. 586-589 (32:543); Tennessee v. Union & Planters' Bank, 152 U. S. 454-472 (38:511).

³⁶ New Orleans v. Benjamin, 153 U. S. 411-435 (38:764);

Shreveport v. Cole, 129 U. S. 36-44 (32:589); Starrin v. New York, 115 U. S. 248-257 (29:388); Little York Gold Wash. & Water Co. v. Keys, 96 U. S. 199 (24:656).

³⁷ Little York Gold Wash. & Water Co. v. Keys, 96 U. S. 199-204 (24:656); Barry v. Edmunds, 116 U. S. 550-566 (29:729); Shreveport v. Cole, 129 U. S. 36-44 (32:589); New Orleans v. Benjamin, 153 U. S. 411-435 (38:764); Newburyport Water Co. v. Newburyport, 193 U. S. 561-579 (48:795); Sawyer v. Piper, 189 U. S. 154-158 (47:757); Hamilton v. Western Land Co., 147 U. S. 531 (37:268); Wilson v. North Carolina, 169 U. S. 586 (42:865); New Orleans Water Co. v. Louisiana, 185 U. S. 336-354 (46:936).

order to make out a case, assume that the state courts will fail to do what the constitution and laws of the United States require of them, but will, on the contrary, presume that the state judiciary will enforce them and protect all titles, rights, privileges and immunities thereunder arising.³⁸

§ 675. Same—Three classes of cases arising under this head of federal jurisdiction.—There are three general classes of cases arising under this head of federal jurisdiction, viz.:³⁹

(1) Suits at law or in equity arising under the constitution of the United States.⁴⁰

(2) Suits at law or in equity arising under a law or laws of the United States.⁴¹

(3) Suits at law or in equity arising under a treaty or treaties of the United States.⁴²

§ 676. Suits arising under the constitution—Not susceptible of classification.—The federal constitution is so comprehensive in the rights it secures, and the interests and transactions affected by it are so varied and multifarious, that it is impossible to classify the suits that may arise under that instrument. Whenever there is a real and substantial claim of a right, title, privilege or immunity under any of its provisions, whether that

³⁸ *Shreveport v. Cole*, 129 U. S. 36-44 (32:589); *R. Co. v. Ferry Co.*, 108 U. S. 18 (27:636); *New Orleans v. Benjamin*, 153 U. S. 411-435 (38:764).

³⁹ 26 U. S. Stat. at L. ch. 866, sec. 2, p. 433.

⁴⁰ *Barry v. Edmunds*, 116 U. S. 550 (29:729); *Smith v. Greenhow*, 109 U. S. 669 (27:1080); *White v. Greenhow*, 114 U. S. 307 (29:199); *Hamilton Gaslight & C. Co. v. Hamilton*, 146 U. S. 258 (36:963); *Patton v. Brady*, 184 U. S. 608-624 (46:713); *Swafford v. Templeton*, 185 U. S. 487-494 (46:1005); *Cummings v. Chicago*, 188 U. S. 410-431 (47:525); *Pacific Electric R. Co. v. Los Angeles*, 194 U. S. 112-120 (48:896); *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517-538 (48:1102); *Water*

Co. v. Knoxville, 200 U. S. 22-38 (50:353); *Vicksburg v. Vicksburg Waterworks Co.*, 202 U. S. 453-472 (50:1102).

⁴¹ *Ames v. Kansas*, 111 U. S. 449 (28:482); *Kansas Pac. R. R. Co. v. Atchison, etc. R. R. Co.*, 112 U. S. 414 (28:794); *Cooke v. Avery*, 147 U. S. 375 (37:209); *Doolan v. Carr*, 125 U. S. 618 (31:844); *Bachrack v. Norton*, 132 U. S. 337 (33:337); *Howard v. United States*, 184 U. S. 676-694 (46:754); *Felbleman v. Packard*, 109 U. S. 421-423 (27:984); *Reagan v. Aiken*, 138 U. S. 109 (34:892); *Bock v. Perkins*, 139 U. S. 628-630 (35:314); *Auten v. Bank*, 174 U. S. 125 (43:920).

⁴² *Filhiol v. Maurice*, 185 U. S. 108 (46:827); *Sloan v. United States*, 193 U. S. 614-621 (48:814).

provision be one vesting a substantive power in the general government, or imposing a limitation upon that government or upon the states, and the right claimed has been invaded or violated, and the contention in regard to the right claimed is of such a nature or character that it may be presented, by pleadings, in the form of a suit at law or in equity between parties, to a judicial tribunal for adjudication and enforcement, then there is a suit arising under the constitution, and if the sum or value in controversy is of the requisite amount the circuit court has original jurisdiction. It is immaterial that the case may, in addition to the federal question, involve other questions whose solution and determination depend upon general rules and principles of law and jurisprudence, or upon state statutes and constitutions; if a federal question "forms an ingredient in the original case," and the determination of that cause depends upon the construction and application of the constitution, the circuit court has jurisdiction, although other questions of fact and law or both may be involved in it. The judicial power of the general government is coextensive with the operation of the constitution upon the rights of men.⁴³

§ 677. **Same—State laws "impairing the obligation of contracts."**—It is not at all surprising that a large percentage of the cases arising under the constitution spring from the limitation upon the states, inhibiting the passing of laws "impairing the obligation of contracts," as such legislation was one of the prevalent evils afflicting the country during the revolutionary period, and the tendency to follow the legislative precedents of that time was strong, and, besides, the inherent difficulties of the subject render it probable that the state legislatures, though acting in the utmost good faith, will, through inadvertence, continue to pass enactments obnoxious to that provision of the fundamental law. It is true, that when the first great cases arose under that provision, the circuit courts had not been vested with original jurisdiction over controversies of that character, and were not vested with such jurisdiction until the passage of the judiciary act of March 3, 1875, and the first cases under this clause of the constitution reached the supreme court by its appellate jurisdiction over the circuit courts, the original

⁴³ *Osborn v. Bank*, 9 Wheat. 739-914 (6:204); *Michigan Cent. R. v. Power*, 201 U. S. 290-291 (50:—); *Federalist* No. LXXX.

jurisdiction of that court being based on diversity of citizenship,⁴⁴ or by writ of error to the highest courts of the state.⁴⁵ But since the original jurisdiction has been given to the circuit courts in this class of cases, the greater portion of those cases have arisen under the impairment clause.⁴⁶

§ 678. Same—Same—Contracts made by states.—The federal constitution is the supreme law of the land; it is supreme over all the co-ordinate departments of the general government; it is supreme over all the states, as well as over all persons, and all state legislative enactments in conflict with it are absolutely null and void; and it is the duty of all courts, state and federal, to give effect to the constitution as the supreme law, whenever its provisions apply in cases arising before them, “anything in the constitution or laws of any state to the contrary notwithstanding.” The eleventh amendment to the constitution, securing to the states immunity against compulsory suit, does not exempt them from the operation of the constitutional inhibition that no state shall pass any law impairing the obligation of contracts, and contracts between a state and individuals are as fully protected by the inhibition as contracts between two individuals; and while it is true that there is, under the constitution, no legal remedy, by a direct suit, in the courts of the United States, for compensation in damages or for specific performance, against a state itself, for a violation of its contracts, yet, it is also true that, when a declaration at law or a bill in equity is filed by proper parties against proper parties, alleging as a cause of action, in whole or in part, the invalidity of a law

⁴⁴ *Fletcher v. Peck*, 6 Cranch, 87 (3:162).

⁴⁵ *Dartmouth College v. Woodward*, 4 Wheat. 518 (4:629); *Charles River Bridge v. Warren River Bridge*, 11 Pet. 420 (9:773); *Bank v. Sharp*, 6 How. 301 (12:447).

⁴⁶ *Smith v. Greenhow*, 109 U. S. 669–671 (27:1080); *White v. Greenhow*, 114 U. S. 307–308 (29:199); *Allen v. Baltimore & Ohio R. R. Co.*, 114 U. S. 311–317 (29:200); *Barry v. Edmunds*, 116 U. S. 550–566 (29:729); *Hamilton*

Gaslight & C. Co. v. Hamilton, 146 U. S. 258 (36:963); *Davis & Farnum Mfg. Co. v. Los Angeles*, 189 U. S. 207–221 (47:778); *Mercantile Trust & Deposit Co. v. Columbus*, 203 U. S. 311–323 (51:98); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1–23 (43:341); *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65–83 (46:808); *S. C. 202 U. S. 453* (50:1102); *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (50:353); *Cleveland v. Cleveland City R. Co.*, 194 U. S. 517–538 (48:1102.)

enacted by a state upon the ground that it impairs the obligation of a contract made by the state, under which the complaining party claims a right, and in respect to which he seeks relief, a suit arising under the constitution is presented, and the circuit court cannot decline jurisdiction upon the ground that the interests of the state may be indirectly affected, but must take jurisdiction of the cause and proceed to judgment, even though the final determination may result in declaring the state statute void, and in rendering judgments and decrees against state officers against whose acts relief is sought and who seek to justify their acts and conduct under and by the pretended authority of the invalid state enactments, or should result in restraining such state officers from performing pretended official action under color of such invalid state enactments.⁴⁷

§ 679. ~~Same—Same—Same—~~**The Virginia tax and coupon cases.**—After the passage of the federal judiciary act of March 3, 1875, vesting for the first time in the federal circuit courts original jurisdiction, concurrent with the courts of the several states, of cases arising under the constitution, laws and treaties of the United States, among the first cases arising under the constitution were what may be appropriately designated as the *Virginia Tax and Coupon Cases*, some of them originating in the federal circuit courts, others removed to those courts before trial from the state courts, while there were still others commenced and finally tried in the state courts, but all involving the same constitutional question, and being carried, in the due course of appellate procedure, to the supreme court of the United States for final determination. The origin and history of this remarkable litigation, and the legislation of the state of Virginia out of which it arose, are, briefly, in substance as follows:

By the "Funding Act" of the state of Virginia, of March 30, 1871, which provided for the funding of two-thirds of the existing public debt of the state and accrued interest, interest-bearing bonds were issued by the state, to run for a long series of years, bearing interest at the rate of six per cent. per annum,

⁴⁷ *Allen v. Baltimore & Ohio Railroad Co.*, 114 U. S. 311-317 (29:200); *Barry v. Edmunds*, 116 U. S. 550-566 (29:729); *Dodge v. Woolsey*, 18 How. 331 (15:401); *Fletcher v. Peck*, 6 Cranch, 87-148 (3:162).

payable semi-annually, evidenced by coupons attached, payable to bearer, "receivable at and after maturity for all taxes, debts, dues and demands due the state," this being expressed on their face, pursuant to the very terms of the act authorizing their issuance; and afterwards, the General Assembly of the state of Virginia passed an act declaring that its fiscal officers should receive, in payment of the taxes and other demands then due or which should thereafter become due the state, gold and silver coin, United States treasury notes, and national bank currency, and nothing else, and providing that in all cases in which the fiscal officers of the state should take any steps for the collection of any revenue claimed to be due the state from any citizen or taxpayer, such person, if he conceived the same to be unjust, illegal or unconstitutional, might pay the same under protest, and, within thirty days and not longer thereafter, sue the officer collecting the same, and if, upon the trial, it should be determined that the money was wrongfully collected, the court should certify the fact to the auditor of public accounts, whose duty it should then be to issue to the plaintiff a warrant on the treasurer for the repayment of the money paid under protest, and this remedy was made exclusive of all others. Under this condition of affairs, taxpayers tendered to the fiscal officers of the state coupons, issued as above stated, in payment of their taxes, which were refused and distress warrants issued for the collection of the taxes and levied upon property to be sold for that purpose. To redress these wrongs, the taxpayers brought against the fiscal officers of the state actions of detinue, trespass, trespass on the case, and in some cases a writ of mandamus to compel them to accept the coupons in payment of their taxes, and in one case a bill in equity was filed to restrain a sale of property under distress, after a tender and refusal of coupons in payment of the taxes due by the party, it being claimed in all those suits that the coupons, which were, on their face, receivable on and after maturity for all taxes, dues and demands due the state, were a contract between the state and the holders, whose obligation could not be impaired by subsequent legislation. In all the cases, the fiscal officers defended and justified their acts under the act of the General Assembly subsequent to the "Funding Act," forbidding them to receive anything but gold and silver coin, United States treasury notes and national

bank currency in the payment of taxes and other dues and demands due the state; and they pleaded among other things (1) that the coupons were bills of credit and issued in violation of the constitutional inhibition that no state shall "emit bills of credit," (2) that such suits were in fact suits against the state, and (3) that the remedy provided by the act of the General Assembly of Virginia requiring payment under protest and a suit within thirty days to recover the money so paid was exclusive of all other remedies. The supreme court overruled all the contentions of the defendants, and held: (1) That the "Funding Act" and its acceptance by the creditors of the state created a contract between the state and the holders of the bonds and coupons, (2) that the act forbidding its fiscal officers from receiving in the payment of taxes and other dues and demands due the state anything but gold and silver coin, United States treasury notes and national bank currency, impaired the obligation of the contract created by the "Funding Act," and was therefore void, (3) that the remedy provided by the act of Virginia was not exclusive, and (4) the coupons were not "bills of credit," but were valid contracts between the state and the holders or bearers.⁴⁸

§ 680. How a suit in equity may arise under the federal constitution.—What is meant by cases arising under the constitution, in contradistinction from those arising under the laws of the United States? What equitable causes can grow out of the constitution of the United States? These questions were asked by the adversaries of the constitution, while it was pending for adoption, and the answer made by its friends was, substantially, that: the constitution imposes limitations upon the legislatures of the states, and the interdictions result from the constitution and not from the laws of the United States in the ordinary signification of the term laws, and should those limita-

⁴⁸ *Hartman v. Greenhow*, 102 U. S. 672-682 (26:271); *Smith v. Greenhow*, 109 U. S. 669-671 (27:1080); *Antoni v. Greenhow*, 107 U. S. 769-812 (27:468); *Polindexter v. Greenhow*, 114 U. S. 270-306 (29:185); *Chaffin v. Taylor*, 114 U. S. 309-310 (29:198); *White v. Greenhow*, 114 U. S. 307-308 (29:199); *Allen v. Baltimore & Ohio R. R. Co.*, 114 U. S. 311-317 (29:200); *Chaffin v. Taylor*, 116 U. S. 567-572 (29:727); *Barry v. Edmunds*, 116 U. S. 550-566 (29:729); *Royall v. Virginia*, 116 U. S. 572-584 (29:735); *Sands v. Edmunds*, 116 U. S. 585-587 (29:739).

tions and interdictions be violated by the states, controversies arising out of the conflict would be cases arising under the constitution, and should there be an element of equitable jurisdiction in any such case, such case would be a "suit in equity arising under the constitution of the United States;"⁴⁹ and the subsequent judicial history of the country has vindicated and justified the wisdom and soundness of the answer.⁵⁰

§ 681. **Same—Suit in equity to enjoin unconstitutional sale of property for taxes.**—This subject is well illustrated and exemplified by one of the Virginia tax and coupon cases discussed in a preceding section. The Baltimore and Ohio Railroad Company filed its bill in equity in the circuit court of the United States for the western district of Virginia, against the auditor and treasurer of the state and the treasurer of Augusta county, alleging that it was a corporation created by the state of Maryland, and a citizen of that state, and that it was, as lessee, in possession of and operating certain railway lines in Virginia, and was liable by law for the payment of certain taxes assessed upon said railway lines and its rolling stock; and that the plaintiff, being the owner and holder of the requisite amount of coupons for interest cut from bonds of the state of Virginia, issued under the "Funding Act" of that state and receivable by virtue thereof in payment of the taxes, tendered the same, with coin sufficient exactly to make the required amounts, in payment and discharge of the taxes, the tender being made within the time and to the persons required by the laws of the state, but that said coupons were refused by the fiscal officers, and the plaintiff brought them into court, subject to its order, for the payment of said taxes; and that defendants had levied upon and seized certain cars and locomotives belonging to the plaintiff and used by it in the operation of its railway lines, and threatened to make further levies upon other cars and engines, to be sold for the payment of said taxes. The plaintiff, in its bill, prayed for an injunction against the sale of its property, upon the ground that it was necessary to protect it in the im-

⁴⁹ Federalist No. LXXX.

⁵⁰ Dodge v. Woolsey, 18 How. 331 (15:401); Davis v. Gray, 16 Wall. 220 (21:453); Allen v. Baltimore & Ohio R. R. Co., 114 U.

S. 311-317 (29:200); Pennoyer v. McConnaughy, 140 U. S. 1-25 (35:363); Louisiana Board of Liquidation v. McComb, 92 U. S. 531-541 (26:623).

munity to which it was entitled, by virtue of the contract with the state of Virginia, secured by the constitution of the United States, against state laws impairing its obligation. The injunction was prayed upon the further grounds of irreparable injury, want of adequate remedy at law, the avoidance of a multiplicity of suits, to remove the cloud upon the title to the railroad property caused by the tax liens, and because the acts complained of prevented the proper exercise by the plaintiff of its franchise, involving the public duty of operating the railway lines of which it was lessee and which were in its possession. The facts alleged in the bill being admitted, there was a final decree in favor of the plaintiff for a perpetual injunction, as prayed, which was, on appeal, affirmed by the supreme court, upon the grounds, (1) that the coupons were a contract between the state and the holder, and (2) that the act of Virginia subsequent to the "Funding Act" prohibiting its fiscal officers from receiving anything but money for taxes impaired the contract and was, therefore, void, and (3) that the case presented by the bill was one of equitable cognizance and in which a circuit court of the United States had jurisdiction to grant relief by injunction. In other words, the supreme court held that it was a suit in equity arising under the constitution of the United States.⁵¹

⁵¹ *Allen v. Baltimore & Ohio R. Co.*, 114 U. S. 311-317 (29:200). In the conclusion of its opinion in the case here cited, after a careful review of the authorities, the court said:

"In the case of national banks, the assessment illegally assessed under the authority of state laws, in violation of acts of congress, are habitually restrained by the preventive remedy of injunction; and the jurisdiction of the courts of the United States in those cases is regarded as in the highest degree beneficial and necessary to prevent the agencies of the government of the United States from being hindered and embarrassed in the performance of their functions by state legislation. The

exercise of that jurisdiction, and by means of that remedy in such cases, is to vindicate the supremacy of the constitution, and to maintain the integrity of the powers and rights which it confers and secures; and that jurisdiction is vested in the courts of the United States because the cases embraced in it are necessarily cases arising under the constitution and laws of the United States.

"Where the rights in jeopardy are those of private citizens, and are of those classes which the constitution of the United States either confers or has taken under its protection, and no adequate remedy for their enforcement is provided by the forms and pro-

§ 682. **Same—Suit in equity to protect land grant to railroad company.**—Where a state charters a railroad company, and makes to it large land grants, to be vested upon the completion of the construction of a designated mileage of the railroad, and the company complies with the conditions imposed upon it, the act of incorporation and the land grant are contracts, and, as such, are within the protection of that clause of the constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts; and a circuit court of the United States has jurisdiction of a suit in equity to enjoin state officers from disposing of the lands so granted, in violation of the contract, under constitutional and statutory provisions of the state, such suit being one arising under the constitution. Such a remedy in such a case is necessary to prevent a cloud from being cast upon the title of the railroad company, and to prevent irreparable injury.⁵²

§ 683. **Same—Restraining state officers from executing unconstitutional statute.**—While it is well settled that no action can be maintained in a federal court against a state, without its consent, even though the sole object of the suit be to bring the state within the operation of the constitutional inhibition against the passing of any law impairing the obligation of contracts, and this immunity from suit, of the state, is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place a state within the reach of the process of the court, yet it is equally well settled that the circuit courts of the United States, sitting in equity, have jurisdiction of a suit to restrain state officers from executing unconstitutional state statutes, when to execute them would violate rights and privileges of the complaining parties which are secured to them by the federal constitution, and would work irreparable injury. Such suits are suits in equity arising under the constitution.⁵³

ceedings purely legal, the same necessity invokes and justifies, in cases to which its remedies can be applied, that jurisdiction in equity vested by the constitution of the United States, and which cannot be affected by the legislation of the states. In the present case, the jurisdiction in equity to

grant the relief prayed for by injunction, and the propriety of its exercise, are alike indisputable."

⁵² Davis v. Gray, 16 Wall. 203-233 (21:447).

⁵³ Pennoyer v. McConnaughy, 140 U. S. 1-25 (35:363), and cases cited; Scott v. Donald, 165 U. S. 107-117 (41:648).

§ 684. Same—Restraining state officers from wrongful administration of valid state statute.—State officers may wrongfully administer a perfectly valid and constitutional state statute, and under color of its authority deprive a party of the equal protection of the laws, or deprive him of some other right secured by the federal constitution. Whenever state officers commit or threaten to commit such acts, and in that manner invade the rights of a party secured by the constitution, the circuit courts of the United States have jurisdiction of a suit in equity, as one arising under the constitution, to restrain them. The constitutionality of the state statute will not avail to oust the federal courts of jurisdiction in such cases. A valid law may be wrongfully administered by state officers, and in such manner as to make its administration an illegal burden and exaction upon the individual.⁵⁴

§ 685. Same—May arise under any constitutional provision securing a right.—Constitutional restrictions upon the states are, by no means, the only provisions under which suits in equity may arise. If a right secured by a provision vesting an independent substantive power in the federal government, such, for an instance, as the power to regulate interstate commerce, be invaded by a state officer under color of an unconstitutional state statute, and such invasion will, unless restrained, result in irreparable injury, the circuit courts of the United States have jurisdiction of a suit in equity, as one arising under the constitution, to restrain the execution of the statute.⁵⁵

§ 686. Municipal ordinances as laws “impairing the obligation of contracts” —Suits to enjoin.—It is now well settled that an ordinance of the common council of a municipal corporation may be such an exercise of legislative power delegated by the state legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may be properly considered as a law within the meaning of the constitutional inhibition that no state shall pass any law impairing the obligation of contracts;⁵⁶ and a bill in equity which, by appropriate averments of facts, shows

⁵⁴ *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362-413 (38:1014); *Atlantic Coast Line R. Co. v. North Carolina Corp. Com.*, 206 U. S. 1-27 (51:933).

⁵⁵ *Scott v. Donald*, 165 U. S. 107-117 (41:648).

⁵⁶ *Mercantile Trust & D. Co. v. Columbus*, 203 U. S. 311 (51:198); *St. Paul Gaslight Co. v. St. Paul*,

that a municipal corporation has passed and is about to execute an ordinance which impairs the obligations of a contract previously made by it with the plaintiff or under which the plaintiff asserts some rights, and shows that he is entitled to some equitable relief against the operation of such ordinance, presents a suit in equity arising under the federal constitution, of which a federal circuit court has original jurisdiction, without regard to the citizenship of the parties, if the requisite sum or value be involved.⁵⁷

§ 687. Suits at law arising under the federal constitution.—Any suit brought upon a legal cause of action, as contradistinguished from an equitable cause of action, to vindicate a substantial right secured by the federal constitution, and the correct decision of which depends upon the construction and application of the constitution, is, within the meaning of the present federal judiciary act, a suit at law arising under the constitution of the United States, of which the federal circuit courts have original jurisdiction, concurrent with the state courts, without regard to the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁵⁸

§ 688. Same—Action of trespass against state officers for seizure of property under unconstitutional state statutes.—When state officers, acting under a state statute, which is repugnant to the federal constitution, seize and sell or confiscate or destroy property, the owners may maintain, against them, a common-law action of trespass to recover damages, both com-

181 U. S. 142-148 (45:788); *Davis v. Los Angeles*, 189 U. S. 207-216 (47:778); *New Orleans Waterworks v. Louisiana Sugar Ref. Co.*, 125 U. S. 18-31 (31:607); *Hamilton Gaslight & Coke Co. v. City of Hamilton*, 146 U. S. 258 (36:963); *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (43:341); *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65-83 (46:808); S. C. 202 U. S. 453 (50:1102); *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (50:353); *Cleveland v. Cleveland City R. Co.*,

194 U. S. 517-538 (48:1102); *Detroit v. Detroit Citizens' Street R. Co.*, 184 U. S. 368 (46:592).

⁵⁷ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1 (43:341); *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S. 65-83 (46:808); S. C. 203 U. S. 453 (50:1102); *Knoxville Water Co. v. Knoxville*, 200 U. S. 22 (50:353).

⁵⁸ *Barry v. Edmunds*, 116 U. S. 550-566 (29:729); *Scott v. Donald*, 165 U. S. 58-107 (41:632); *White v. Greenhow*, 114 U. S. 307-308 (29:199).

pensatory and exemplary, to be determined and controlled by the established rules of law, for the wrongful taking and sale or confiscation or destruction, and the state officer cannot justify his wrongful act by pleading the authority of the state; and such action may be maintained in a federal circuit court, as one arising under the constitution of the United States, without regard to the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁵⁹

§ 689. **Same—Same—Barry vs. Edmunds.**—In the case of Barry against Edmunds,⁶⁰ which was one of the Virginia Tax and Coupon cases, brought in a federal circuit court, the plaintiff alleged in his declaration that he owed \$59.81 taxes, to pay which he tendered to defendant, who was treasurer of Fauquier county, and whose duty it was to collect the taxes, coupons cut from bonds issued by the state of Virginia under the Funding Act, and lawful money, together constituting the full amount of said taxes, which the defendant declined to receive; and that the defendant, *colore officii*, unlawfully, wilfully, maliciously and against plaintiff's will, under the pretended authority of void process, and in open defiance of known law, accompanied by

⁵⁹ Barry v. Edmunds, 116 U. S. 550-566 (29:729); Scott v. Donald, 165 U. S. 58-107 (41:632); White v. Greenhow, 114 U. S. 307-308 (29:199).

⁶⁰ Barry v. Edmunds, 116 U. S. 550-566 (29:729). In the course of its opinion in this case, the court, speaking of the jurisdictional amount and the measure of damages, said:—

"It is quite clear that the amount of the taxes alleged to be delinquent, for payment of which the seizure is made, is immaterial. It is equally clear that the plaintiff is not limited in his recovery to the mere value of the property taken. That would not necessarily cover his actual, direct and immediate pecuniary loss. In addition, according to the settled law of this court, he might show him-

self, by proof of the circumstances, to be entitled to exemplary damages calculated to vindicate his right and protect it, against future similar invasions. 'It is a well established principle of the common law, that, in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offense rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers; but, if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument.'"

conduct intended to bring plaintiff into public contempt and odium, with force and arms entered upon plaintiff's premises and levied upon and forcibly seized and carried away one horse of the value of \$125.00 for the purpose of selling same, and thus compelling plaintiff to pay his taxes in a medium other than that already offered by him. The declaration stated in great detail circumstances of aggravation, with averments of special damages, and laid plaintiff's damages at six thousand dollars. The action was based upon the proposition, that the statute of Virginia which forbade the fiscal officers of the state from receiving the coupons in payment of taxes impaired the obligation of the contract between the state and the holders of the coupons, and was, therefore, void, which had been so decided, previously, by the supreme court, and it was alleged that the act of the officer in seizing plaintiff's horse was in contempt and defiance of that decision and the constitution of the United States and the judicial power thereof. The circuit court dismissed the case on the ground that the taxes due by plaintiff were less than one hundred dollars and the property seized was worth less than two hundred dollars, and if the jury should render a verdict for five hundred dollars damages (the statute then requiring an excess of that amount to give jurisdiction) such verdict would be excessive, and the court would feel compelled to set it aside. On writ of error, the supreme court held (1) that the declaration stated a case arising under the federal constitution, and (2) a proper case for exemplary damages was stated, and that as matter of strict law it could not be judicially declared that, upon the case stated in the declaration, the plaintiff was precluded from recovering anything in excess of five hundred dollars as damages, exclusive of costs.

§ 690. **Same—Same—Scott vs. Donald.**—The case of Scott against Donald⁶¹ arose under the "Dispensary Law" of South Carolina. The suit was brought in the circuit court of the United States for the district of South Carolina. The plaintiff alleged in his declaration that he had imported into the state for his own use certain wines and liquors, which the defendant, who was a state constable, acting under the "Dispensary Law," seized and carried away; and that the plaintiff, in importing the wines and liquors for his own use, was in the exercise of his legal

⁶¹ Scott v. Donald, 165 U. S. 58-107 (41:632).

rights guarantied by the constitution of the United States, and the constable, in seizing and carrying away plaintiff's property, acted knowingly, wilfully and maliciously, and with intent to oppress, humiliate and intimidate plaintiff and make him afraid to rely upon the constitution and laws of the United States and the judicial power thereof for his protection in the rights, privileges and immunities secured to him by the constitution and laws of the United States. Plaintiff laid his damages at six thousand dollars and recovered three hundred dollars. On writ of error the supreme court held (1) that the provisions of the "Dispensary Law" of South Carolina which authorized the seizure by the constable was in conflict with the provision of the federal constitution giving congress the power to regulate foreign and interstate commerce and the acts of congress made thereunder, and was therefore void, and that the case was one arising under the constitution; (2) that the case stated in the declaration was a proper one for the imposition of exemplary damages, and, although the value of the goods was small and the recovery only three hundred dollars, the amount in dispute was sufficient to give the court jurisdiction, and (3) that the suit was not against the state. Regarding the rule for the measure of damages, the court declared that the intentional, malicious, and repeated interference by the defendant with the exercise of personal rights and privileges secured to the plaintiff by the constitution of the United States, as alleged in the declaration, constituted a wrong and injury not the subject of compensation by a mere money standard, but fairly within the doctrine of the cases where exemplary damages have been allowed; and that the declaration having laid the damages at six thousand dollars, a jury would have been at liberty to find a verdict in any amount not in excess of that sum, and the jurisdiction of the court, having once validly attached, could not be defeated by the fact that the recovery fell below two thousand dollars.

§ 691. **Same—Same—Exemplary damages as an element in a case arising under the constitution.**—The doctrine of exemplary damages, as defined by the principles of the common law, has long been recognized and administered, in proper cases, by the courts of the United States;⁶² and the right to recover such

⁶² Day v. Woodworth, 13 How. 7 Fed. R. 63; Galena v. R. Co., 363-373 (14:181); Brown v. R. Co., 13 Fed. R. 124; Wilson v. Vaughn,

damages may constitute an important element in a case arising under the constitution of the United States, such, for an instance, as an action to recover damages for the seizure of, or other trespass upon property, by state officers, acting under color of authority of a state statute which is repugnant to the federal constitution, where the trespass is wanton, wilful and malicious, and committed with intent to injure and oppress the owner.⁶³

§ 692. Same—Suit arising under both the constitution and a federal statute.—A suit may be of such a nature that its decision requires the construction and application of a provision of the federal constitution, and also a federal statute. It is then a suit arising under the constitution and laws of the United States. A bill in equity, filed in a circuit court of the United States, by citizens of the state of Illinois, against the city of Chicago, for the purpose of obtaining a final decree, perpetually restraining defendant city, its officers and agents, from interfering with the plaintiffs in the construction of a dock, in Calumet river, in front of certain lands owned by them and situated on the river within the limits of the city, the river being a navigable water of the United States, although wholly situated within the territorial limits of the state of Illinois, and in which bill the plaintiffs based their right upon the federal constitution, and upon certain acts of congress and a permit from the secretary of war, which legislative enactment and action of the secretary of war were alleged in the bill to be in execution of the power of congress, under the constitution, over the navigable waters of the United States, was held to present a suit in equity arising under the constitution and laws of the United States, within the meaning of the present federal judiciary act, of which the federal circuit court had original jurisdiction, concurrent with the courts of the state, the matter in dispute exceeding, exclusive of interest and costs, the sum or value of two thousand dollars; although it was determined upon the merits that it was not the intention of congress in enacting the legislation relied on by the plaintiffs to regulate interstate commerce, nor supersede the authority of the state over structures in navi-

23 Fed. R. 231; Press Pub. Co. v. Monroe, 73 Fed. R. 201; Ry. Co. v. Hume, 115 U. S. 521 (29:466). ⁶³ Scott v. Donald, 165 U. S. 58-107 (41:632); Barry v. Edmunds, 116 U. S. 550-566 (29:729).

gable waters within its limits, and the bill was upon that ground dismissed. In other words, the supreme court held that the circuit court had jurisdiction of the suit as one arising under the constitution and laws, but the plaintiffs were not entitled to relief.⁶⁴

§ 693. Suits arising under the laws of the United States.—When a plaintiff, in the statement of his cause of action, in his declaration or bill, presents no constitutional question, but does claim a title, right, privilege or immunity under a law or laws enacted by the congress of the United States, and the correct decision of the case depends upon the construction and application of such law or laws, the suit is one arising under the laws of the United States, as contradistinguished from a suit arising under the constitution, jurisdiction of which is vested in the circuit courts of the United States, concurrently with the courts of the several states, independently of the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars. Such a case is as fully within the original jurisdiction of the circuit court, as if it were a case arising under the constitution.⁶⁵

⁶⁴ *Cummings v. Chicago*, 188 U. S. 410-431 (47:525).

In delivering the opinion of the court in the case here cited, Mr. Justice Harlan, said:

"We hold that the circuit court had jurisdiction in this case. That the parties, plaintiffs and defendants, are citizens of the same state is not sufficient to defeat the jurisdiction; for by the act of March 3, 1887, chap. 373, as corrected by the act of August 13, 1888, chap. 866, the circuit courts have jurisdiction, without reference to the citizenship of the parties, of suits at common law or in equity arising under the constitution or laws of the United States. 24 Stat. at L. 552, 25 Stat. at L. 433 (U. S. Comp. Stat. 1901, p. 508). The present suit does arise under the constitution and laws of the United States, because the plain-

tiffs base their right to construct the dock in question upon the constitution of the United States, as well as upon certain acts of congress and the permit (so called) of the Secretary of War,—which legislative enactment and action of the Secretary of War were, it is alleged, in execution of the power of congress, under the constitution, over the navigable waters of the United States. Clearly, such a suit is one arising under the constitution and laws of the United States. That it is a suit of that kind appears from the bill itself. The allegations which set forth a federal right were necessary in order to set forth the plaintiff's cause of action."

⁶⁵ *Wyman v. Wallace*, 201 U. S. 230-244 (50:738); *Ames v. Kansas*, 111 U. S. 449-472 (28:482);

§ 694. **Same—Suits on the official bonds of federal officers.** A suit at law or in equity brought by a private suitor against a federal officer and his sureties, on his official bond, for a breach of its conditions, is a suit arising under the laws of the United States, within the meaning of the present federal judiciary act, of which the federal circuit courts have original jurisdiction, concurrent with the courts of the several states, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, without regard to the citizenship of the parties. The *ratio decidendi* in such cases is that, the execution of the bond is required, its conditions fixed, the extent of the liability of the obligors defined, and the right of suit upon it given, by federal statute, and a suit upon such bond is a right, title, privilege or immunity set up and claimed by the plaintiff under a law or laws of congress, the construction and application of which are necessary to the decision of the case.⁶⁶

§ 695. **Same—Same—Suit on bond of United States marshal.** A suit against a United States marshal and his sureties, on his official bond, to recover damages for a breach of the conditions thereof, in wrongfully levying a writ of attachment upon the personal property of the plaintiff, is a suit arising under a law or laws of the United States, of which the federal circuit courts have original jurisdiction, concurrent with the courts of the several states, without regard to the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁶⁷

§ 696. **Same—Same—Suit on bond of federal court clerk.—** A suit against a clerk of a circuit court of the United States and his sureties, on his official bond, to recover damages for the misappropriation by him of funds paid to him as clerk, or for other breach of the conditions of his bond, is a suit arising un-

Kansas Pacific Railway Co. v. Atchison, Topeka & Santa Fe Railroad Co., 112 U. S. 414-423 (28:794).

⁶⁶ **Sonnentheil v. Christian Moerlein Brewing Co.**, 170 U. S. 401-416 (43:492); **Felbleman v. Packard**, 109 U. S. 420 (27:984); **Bachrack v. Norton**, 132 U. S. 337 (33:377); **Bock v. Perkins**, 139 U. S.

628 (35:314); **Howard v. United States, use of Stewart**, 184 U. S. 676-694 (46:754).

⁶⁷ **Sonnentheil v. Christian Moerlein Brewing Co.**, 172 U. S. 401-416 (43::492); **Felbleman v. Packard**, 109 U. S. 420 (27:984); **Bachrack v. Norton**, 132 U. S. 337 (33:377); **Bock v. Perkins**, 139 U. S. 628 (35:314).

der a law or laws of the United States, of which the federal circuit courts have original jurisdiction, concurrent with the courts of the several states, without regard to the citizenship of the parties, when the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁶⁸

§ 697. **Same—Suit to enforce individual liability of shareholder of liquidating national banks.**—A suit in the nature of a creditor's bill, filed by a creditor of a national bank which has gone into liquidation, on behalf of himself and all other creditors of the bank, to enforce the individual liability imposed by federal statute on the stockholders of the bank, is a suit to enforce a special right given by the laws of the United States, and is a suit arising under those laws, of which the circuit courts have original jurisdiction independently of the citizenship of the parties; and in order to maintain such a suit in equity it is not necessary for the creditor to obtain a judgment at law on his claim before filing his bill.⁶⁹

§ 698. **Same—Ejectment when plaintiff's title depends upon validity of patent from the United States.**—An action of ejectment, where the plaintiff claims title to the land sued for under a patent issued by the United States, and the defendant denies the validity of the patent, and claims that it is void for want of power in the officers of the government to issue it, is a suit arising under the laws of the United States, of which the circuit courts have jurisdiction, although there is no diversity of citizenship.⁷⁰

§ 699. **Same—Ejectment when plaintiff claims title through judicial sale under federal court judgment.**—An action of trespass to try title, in which the plaintiff claims title to the land under and by virtue of a purchase of the same at a judicial sale made under a judgment rendered by a circuit court of the United States, and the validity of his purchase and title depend upon the existence of a lien of the judgment, under which he purchased, upon the land, the existence of such lien being alleged by the plaintiff, is a suit arising under the laws of the United States, of which the circuit court has jurisdiction, concurrent

⁶⁸ Howard v. United States, use of Stewart, 184 U. S. 676-694 (46: 754),^{*} affirming S. C. 42 C. C. A. 169, 102 Fed. R. 77.

⁶⁹ Wyman v. Wallace, 201 U. S. 230-244 (50:738).

⁷⁰ Doolan v. Carr, 125 U. S. 618-642 (31:844).

with the courts of the several states, without diversity of citizenship, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁷¹

§ 700. Same—Two corporations claiming same lands under different acts of congress.—A bill in equity, filed by one corporation against another, seeking to secure to plaintiff the conveyance of certain lands, the title to which, as shown by the allegations of the bill, is claimed by both corporations under different acts of congress, presents a case arising under the laws of the United States. The decision of such a case depends upon the construction and application of the statutes under which the parties claim title to the land.⁷²

§ 701. Same—Suit to test validity of the consolidation of railroad companies under acts of congress.—A suit, the sole purpose of which is to test the validity of the consolidation of certain railroad companies, which validity rests alone upon the authority conferred by acts of congress, is a suit arising under the laws of the United States. An act of congress “is the first ingredient in the case, is its origin, is that from which every other part arises.”⁷³

§ 702. Suits by and against federal corporations.—The decision⁷⁴ of Chief Justice Marshall defining the nature of a suit brought by a federal corporation has never been receded from nor modified, but, on the contrary, has been extended, and it is now the settled doctrine of the supreme court that all suits at law and in equity brought by or against corporations created and organized by and under acts of congress of the United States are, within the meaning of the federal constitution and the federal judiciary act now in force, suits arising under the laws of the United States, and that where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, the federal circuit courts have original jurisdiction of such suits, concurrent with the courts of the several states, independently of diversity of citizenship;⁷⁵ the *ratio decidendi* being, that such a corporation derives its existence and powers,

⁷¹ *Cooke v. Avery*, 147 U. S. 375-386 (37:209).

⁷² *Kansas Pacific Railway Co. v. Atchison, Topeka & Santa Fe Railroad Co.*, 112 U. S. 414-423 (28:794).

⁷³ *Ames v. Kansas*, 111 U. S. 449-472 (28:482).

⁷⁴ *Osborn v. The Bank of The United States*, 9 Wheat. 817-828 (6:204).

⁷⁵ *Union Pac. Ry. Co. v. Myers*,

its capacity to sue and be sued, its right to be a corporation, its right to transact business and make contracts and acquire and own and hold property, directly through federal legislation, and that an allegation in a suit that it is a federal corporation necessarily discloses a claim by the plaintiff of a right, title, privilege or immunity under a law of the United States, and that, therefore, the suit inevitably arises under such law.⁷⁶

§ 703. Same—Same—Rule abolished as to national banks.—

The rule of federal jurisdiction, stated in the section next preceding, that all suits brought by or against federal corporations are suits arising under the laws of the United States, would, if allowed unrestrained operation, have drawn into the federal courts all suits where a national bank should be a party and the matter in dispute should exceed, exclusive of interest and costs, the sum or value of two thousand dollars; but by act of congress of July 22, 1882, the rule was wholly abolished so far as national banks are concerned, and since that act the federal courts have no jurisdiction of suits in which a national bank is a party upon the ground that the bank is a federal corporation. The rule now has absolutely no application to national banks.⁷⁷

§ 704. Same—Suit against receiver of a national bank.—A receiver of a national bank, appointed by the comptroller of the currency, is an officer of the United States, and a suit against him is one arising under the laws of the United States, and the circuit courts of the United States have original jurisdiction of such a suit, concurrent with the courts of the several states, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, independently of the citizenship of the parties.⁷⁸

§ 705. Same—Suit against federal court receiver does not arise under laws of the United States.—A suit against a receiver, appointed by a federal court under and by virtue of its

115 U. S. 1-25 (29:319); *Butler v. Home for Soldiers*, 145 U. S. 64-75 (36:346); *Railroad Co. v. Ry. & Navigation Co.*, 160 U. S. 77-101 (40:346); *Ry. Co. v. Cox*, 145 U. S. 593-608 (36:829).

⁷⁶ *Osborn v. The Bank of the United States*, 9 Wheat. 817-828 (6:204).

⁷⁷ 22 U. S. Stat. at L. ch. 290, sec. 4, p. 162; *Bank v. Cooper*, 120 U. S. 778-784 (30:816); *Whitemore v. Bank*, 134 U. S. 527-530 (33:1002); *Ex parte Jones*, 164 U. S. 691-694 (41:601); 1 Bates Fed. Eq. Proc. sec. 90.

⁷⁸ *Auten v. Bank*, 174 U. S. 125-149 (43:920); *Speckart v. German*

general equity powers, and not under any provision of the federal constitution and laws, and whose liability depends on general laws, and whose defense does not rest upon any act of congress, is not a suit arising under the constitution or laws of the United States. There existed at one time some confusion and doubt upon this subject, but the rule is now definitely settled as here stated.⁷⁹

§ 706. Same—Suit against election officers for wrongful denial of right to vote for member of congress.—A suit brought against state election officers to recover damages for wrongfully refusing to allow the plaintiff to vote at a national election for a member of the house of representatives of the congress of the United States is a suit arising under the constitution and laws of the United States, of which the federal circuit courts have jurisdiction without regard to the citizenship of the parties, where the requisite jurisdictional amount is in dispute.⁸⁰

§ 707. Suits arising under treaties of the United States.—A treaty is a contract between independent nations, touching matters concerning their interests as such, dependent for its execution and observance upon the honor of the contracting parties,

Nat. Bank, 85 Fed. R. 12; Gilbert v. McNulta, 96 Fed. R. 83.

⁷⁹ Gableman v. Peoria D. & E. R. Co., 179 U. S. 335-342 (45:220); Bausman v. Dixon, 173 U. S. 113-115 (43:633); Pope v. Ry. Co., 173 U. S. 573-582 (43:814).

In delivering the opinion of the court in Gableman v. Ry. Co., Chief Justice Fuller said:

"The inquiry we are pursuing does not fall within the ruling that a corporation created by congress has a right to invoke the jurisdiction of the federal courts in respect to any litigation it may have, except as specifically restricted. Nor are the cases against United States officers as such, or on bonds given under acts of congress, or involving interference with federal process, or the due faith and credit to be accorded judgments, in point.

"The question is whether the bare fact that the appointment of this receiver was by a federal court makes all actions against him cases arising under the constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of courts of chancery, and not under any provision of that constitution or of those laws; and that his liability depends on general law, and his defense does not rest on any act of congress. We are of opinion that this question must be answered in the negative, and that this has been heretofore so determined as the circuit court of appeals properly held in this case."

⁸⁰ Swafford v. Templeton, 185 U. S. 487-494 (46:1005); Wiley v. Sinkler, 179 U. S. 58 (45:84).

and not capable of enforcement by judicial decree; a treaty may, however, and often does, contain provisions conferring upon or confirming unto the citizens or subjects of the contracting parties certain titles to property, rights, privileges and immunities, which are capable of judicial enforcement in the ordinary courts of justice, and which provisions, when intended to be operative within the territorial limits of the United States, the federal constitution makes the "supreme law of the land," and they thereby become a part of the municipal law of the states, and furnish to the courts a binding rule of decision in all cases where any title, right, privilege or immunity conferred or confirmed by them is claimed or called in question; but, in order to constitute a treaty provision the "supreme law of the land," and make it a part of the municipal law of the states, it must secure a right to persons or classes of persons, and must come within the powers delegated to the national government by the federal constitution, and not contravene the scheme and essential principles of the dual system of government established by that instrument, nor invade the municipal sovereignty and police power reserved to the states;⁸¹ and a suit in which the plaintiff, in the statement of his cause of action, claims a title, right, privilege or immunity under such treaty provision is, within the meaning of the federal constitution and judiciary acts, a suit arising under a treaty of the United States, jurisdiction of which, concurrent with the courts of the several states, is vested in the federal circuit courts, independently of the citizenship of the parties, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁸²

⁸¹ *Foster v. Nellson*, 2 Pet. 253-317 (7:415); *Edye v. Robertson*, 112 U. S. 580-600 (28:798); *United States v. Ranscher*, 119 U. S. 407-436 (30:425); *Fairfax v. Hunter*, 7 Cranch, 603-632 (3:453); *Orr v. Hodgson*, 4 Wheat. 453-465 (4:613); *Hauenstein v. Lynham*, 100 U. S. 483-491 (25:628); *Chirac v. Chirac*, 2 Wheat. 259-278 (4:234); *Hughes v. Edwards*, 9 Wheat. 489-501 (6:142); *Carneal v. Bank*, 10

Wheat. 181-191 (6:297); *De Geofroy v. Riggs*, 133 U. S. 258-273 (33:642); *People v. Gerke*, 5 Cal. 381; 2 Story's Comm. on Const. sec. 1508.

⁸² *Muse v. Arlington Hotel*, 168 U. S. 430-437 (42:531); *Budzesz v. Illinois Steel Co.*, 170 U. S. 41-45 (42:941); *Filhiol v. Maurice*, 185 U. S. 108-111 (46:827); *Martin v. Hunter*, 1 Wheat. 304-382 (4:97).

§ 708. **Same—Treaty provisions removing disability of alien to take and hold land.**—It is a doctrine firmly established by a long and unbroken line of decisions of the supreme court of the United States, that the law of the state in which land is situated governs and controls its descent and transfer by deed or devise or other means of alienation, and to that law the courts, state and federal, must look for the effect of such instruments and the rules for their construction;⁸³ and a treaty provision bestowing upon aliens the capacity to take and hold land by descent or purchase is a removal of a political disability of the alien, and not a repeal or modification of the land laws of the state where the land lies, nor even a suspension of those laws, for, the disability of alienage being removed by the treaty provision, the alien takes under the law of the state, the treaty in such case acting upon and affecting the political status of the alien, and leaving the state law in force;⁸⁴ and the general government in removing by treaty the political disability of the alien, and in changing his political status, and granting to him a new political capacity, does nothing more than the state, itself, can do by appropriate legislation, and such legislation by a state does not contravene the federal constitution nor constitute the basis of a federal question giving the federal courts jurisdiction.⁸⁵

⁸³ *De Vaughn v. Hutchinson*, 165 U. S. 566-578 (41:827); *Clark v. Clark*, 178 U. S. 186-195 (44:1028); *United States v. Crosby*, 7 Cranch, 115 (3:287); *Clark v. Graham*, 6 Wheat. 577 (5:334); *McGoon v. Scales*, 9 Wall. 23 (19:545); *Brine v. Ins. Co.*, 96 U. S. 627 (24:858); 1 *Bates Fed. Eq. Proc.* sec. 70 and authorities there cited.

⁸⁴ *People v. Gerke*, 5 Cal. 381; *Fairfax v. Hunter*, 7 Cranch, 603-632 (3:453).

⁸⁵ *Blythe v. Hinckley*, 180 U. S. 333-342 (45:557); *Hanrick v. Patrick*, 119 U. S. 156-176 (30:396).

In *Fairfax v. Hunter*, *supra.*, Story, justice, delivering the opinion of the court, said:

"It is clear by the common law,

that an alien can take lands by purchase, though not by descent; or in other words he cannot take by the act of law, but he may by the act of the party. The principle has been settled in the year books, and has been uniformly recognized as sound law from that time. Nor is there any distinction, whether the purchase be by grant or by devise. In either case the estate vests in the alien, not for his own benefit, but for the benefit of the state; or in the language of the ancient law, the alien has the capacity to take but not to hold lands, and they may be seized into the hands of the sovereign. But until the lands are so seized, the alien has complete

§ 709. **Jurisdiction based on diversity of citizenship.**—The circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which there is a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁸⁶

§ 710. **Same — Not residence, but citizenship.**—Citizenship and residence are not synonymous terms; and an averment of residence is not the equivalent of an averment of citizenship, and is insufficient to give the circuit court jurisdiction of a cause, and this rule is not changed by the declaration in the fourteenth amendment to the federal constitution that “all persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States, and of the states where they reside.” The rule since the amendment, as well as before it is that, the plaintiff must distinctly allege that he and the defendant are citizens of different states.⁸⁷

§ 711. **Same—Territories not states within the meaning of the federal constitution and judiciary acts.**—The territories of the United States and the District of Columbia are not states within the meaning of the provisions of the federal constitution and the judiciary acts defining the jurisdiction of the federal courts; and the circuit courts of the United States have no jurisdiction of suits between citizens of the territories of the United

dominion over the same. He is a good tenant of the freehold in a praecipe on a common recovery, and may convey the same to a purchaser, * * * yet it must probably mean that he can convey a defeasible estate only, which on office found will divest. It seems indeed to have been held, that an alien cannot maintain a real action for the recovery of lands. But it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign. We do not find that in respect to these general rights and disabilities, there is any admitted difference be-

tween alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended.”

⁸⁶ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 434; 4 Fed. Stat. Anno. 265, 266; 1 U. S. Comp. Stat. 1901, pp. 507, 508.

⁸⁷ Robertson v. Cease, 97 U. S. 646-651 (24:1057); Parker v. Overman, 18 How. 137-143 (15:318); Denny v. Plroni, 141 U. S. 121-126 (35:657); Ederhart v. Huntsville College, 120 U. S. 223 (30:623); Menard v. Goggan, 121 U. S. 253 (30:914); Grace v. Ins. Co., 109 U. S. 278-285 (27:932).

States or the District of Columbia on one side, and citizens of a state on the other side, where that jurisdiction is based alone upon the citizenship of the parties.⁸⁸

§ 712. Same—Corporation created by a state a citizen thereof.—A corporation created by a state is, within the meaning of the second section of the third article of the federal constitution extending the judicial power of the United States to controversies “between citizens of different states,” and within the meaning of the federal judiciary acts distributing that judicial power, a citizen of the state which created it, and is a competent party, either as plaintiff or defendant, to sustain the jurisdiction of a federal circuit court in a suit at law or in equity in which the jurisdiction is based upon diversity of the citizenship of the parties.⁸⁹

§ 713. Same—Same—Incorporated in more than one state. While it is true that a corporation created by one state may be created a corporation of another state by the legislature of the latter state, in regard to property and acts within its territorial limits, yet such corporation, for the purposes of suing and being sued in the federal courts, and for the purposes of the jurisdiction of those courts, remains a citizen of the state which first created it.⁹⁰

§ 714. Same—Citizenship of national banks for purposes of jurisdiction.—By federal statutory provisions, all national banking associations incorporated under the laws of the United States are, for the purposes of suing and being sued in the courts of the United States, deprived of their character as federal corporations,⁹¹ and are to be deemed citizens of the states

⁸⁸ *Hepburn v. Ellzey*, 2 Cranch, 445 (2:332); *New Orleans v. Winter*, 1 Wheat. 91-95 (4:44); *Barney v. Baltimore*, 6 Wall. 280-291 (18:825); *Hoe v. Jamieson*, 166 U. S. 395-399 (41:1049).

⁸⁹ *Ry. Co. v. James*, 161 U. S. 545-572 (40:802); *Southern Ry. Co. v. Allison*, 191 U. S. 326-339 (47:1078); *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552-577 (43:1081); *Doctor v. Harrington*, 196 U. S. 579-589 (49:606); *Louisville,*

Cincinnati & Charleston R. R. Co. v. Letson, 2 How. 497-559 (11:353); *Marshall v. Baltimore & O. R. Co.*, 16 How. 314 (14:953).

⁹⁰ *Southern Ry. Co. v. Allison*, 190 U. S. 326-339 (47:1078); *Louisville, New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552-577 (43:1081); *Ry. Co. v. James*, 161 U. S. 545-572 (40:802); *St. Joseph & Grand Island R. Co. v. Steele*, 167 U. S. 659-664 (42:315).

⁹¹ 22 U. S. Stat. at L. ch. 290,

in which they are respectively located, and are deprived of the privilege of suing or being sued in the federal courts, except in cases where diversity of citizenship authorizes actions to be brought.⁹²

§ 715. **Same—A state not a citizen.**—A state is not a citizen; and it is well settled that a suit between a state and a citizen or corporation of another state is not a suit between citizens of different states, and a circuit court of the United States has no jurisdiction of such suit, unless it arises under the constitution or a law or a treaty of the United States.⁹³

§ 716. **Same—Same—Suit brought by state on relation of a person.**—A suit brought in a circuit court of the United States by a state upon the relation of a person, upon an official bond of an officer, or the bond of an administrator made payable to the state, for the benefit of persons injured by breaches of its condition, must be treated, so far as the jurisdiction of the court is concerned, as though the relator, or person for whose benefit the suit is prosecuted, was alone named as plaintiff. In such cases, the name of the state is used from necessity, brought about by the rules of pleading, for the benefit of the interested party, who is usually called the relator, and the real controversy is between him and the obligors on the bond, and if there be diversity of citizenship as between them, and the requisite jurisdictional amount be involved, the circuit court will have jurisdiction of the cause.⁹⁴

§ 717. **Same—Persons standing in a fiduciary relation suing or sued.**—When the jurisdiction of the court is invoked upon the ground of the diversity of the citizenship of the parties, and the plaintiff or defendant sustains a fiduciary relation to the subject-matter of the suit, as administrator, guardian or trustee, if such person is by law authorized to sue or defend

sec. 4, p. 162; *Leather Mfg., National Bank v. Cooper*, 120 U. S. 778-784 (30:816); *Whitmore v. Amoskeag National Bank*, 134 U. S. 527-530 (33:1002).

⁹² 24 U. S. Stat. at L. ch. 373, sec. 4, p. 552; 25 U. S. Stat. at L. ch. 866, sec. 4, p. 434; *Petre et al. v. Commercial National Bank of Chicago*, 142 U. S. 644-651 (35:

1144); *Ex parte Jones*, 164 U. S. 691-694 (41:601).

⁹³ *Postal Telegraph Co. v. Alabama*, 155 U. S. 482-488 (39:231); *Arkansas v. Kansas & Texas Coal Co.*, 183 U. S. 185-191 (46:144).

⁹⁴ *State of Indiana, ex rel Stanton v. Glover*, 155 U. S. 513-522 (39:243); *State of Maryland for the use of Markely v. Baldwin*, 112 U. S. 490-495 (28:822).

without joining as parties the persons beneficially interested, the jurisdiction of the court is to be determined by the citizenship of the party suing or sued, and not by the citizenship of the persons beneficially interested.⁹⁵

§ 718. **Same—Suit by assignee of chose in action.**—It is provided by the judiciary act now in force that no circuit or district court shall “have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”⁹⁶

The decisions of the supreme court, construing this provision of the statute, have established the following propositions, namely: (1) A suit to recover the contents of a promissory note or other chose in action is a suit to recover the amount due upon such note, or the amount claimed to be due upon an account, personal contract, or other chose in action; (2) a suit to foreclose a mortgage is within the inhibition of the act, and can only be maintained where the assignor was competent to file the bill; (3) the bill or other pleading must contain an averment showing that the suit could have been maintained by the assignor if no assignment had been made; (4) a suit may be maintained between the immediate parties to a promissory note as endorser and endorsee, provided the requisite diversity of citizenship appears as between them, or upon a new contract arising subsequently to the execution of the original, notwithstanding a suit could not have been maintained upon the original contract, and in such cases the original contract may be considered to ascertain the amount of the damages.⁹⁷

⁹⁵ *Mexican Central R. Co. v. Eckman*, 187 U. S. 429-436 (47:245); *Dodge v. Tulley*, 144 U. S. 451-458 (36:501); *Rice v. Houston*, 13 Wall. 66-68 (20:484); *Coal Co. v. Blatchford*, 11 Wall. 172-178 (20:179); *Bonafée v. Williams*, 3 How. 574-577 (11:732); *Harper v. Norfolk & W. R. Co.*, 36 Fed. R. 102; *Shirk v. City of La Fayette*, 52 Fed. R. 857; *Davies v. Lathorp*, 12

Fed. R. 353; *Browne v. Browne*, 1 Wash. 429, Fed. cas. No. 2,035; 1 Bates Fed. Eq. Proc. sec. 95.

⁹⁶ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433.

⁹⁷ *Kolze v. Hoadley*, 200 U. S. 76-86 (50:377), and authorities there collated and classified; *Mexican National R. Co. v. Davidson*, 157 U. S. 201-209 (39:672), and authorities there collated; *Ameri-*

§ 719. **Same—Same—Bill for specific performance.**—The words of the statute, “the contents of any promissory note or other chose in action,” though infelicitously chosen by the legislature, were designed to embrace, and do embrace, the rights created and conferred by those instruments which are capable of enforcement by suit; and a bill in equity seeking the specific performance of a contract for the sale of land is within the inhibition of the statute, and the federal courts have no jurisdiction of such a bill by an assignee of such a contract, unless the suit could have been maintained by the assignor if no assignment had been made.⁹⁸

§ 720. **Same—Same—Exceptions—Notes of corporation payable to bearer.**—Notes made by a corporation and payable to bearer are expressly excepted from the operation of the statutory provision in regard to suits by the assignee of a chose in action; and this exception, expressed in the words, “any corporation,” includes municipal as well as private corporations, and an assignee or subsequent holder of such notes issued by a municipal corporation, being a citizen of a state different from that of the debtor corporation, is entitled to sue upon them in a federal court without reference to the citizenship of any prior holder.⁹⁹

§ 721. **Same—Same—Same—Foreign bills of exchange.**—Foreign bills of exchange are also excepted from the operation of the statutory restriction upon the right of assignees of choses in action to sue in the federal courts; and a bill of exchange drawn in one of the states of the union upon persons living in another state is, within the meaning of the act, a foreign bill of exchange, and a holder or assignee of it may maintain suit upon it in the federal court where diversity of citizenship exists between him and the payor without reference to the citizenship of a prior holder.¹

can Colortype Co. v. Continental Colortype Co., 188 U. S. 104-108 (47:404), and authorities there cited.

⁹⁸ Shoecraft v. Bloxham, 124 U. S. 730-736 (31:574); Corbin v. Blockham County, 105 U. S. 659-667 (26:1136); Plant Investment Co. v. Ry. Co., 152 U. S. 71-77 (38:358).

⁹⁹ Loeb v. Trustees of Columbia Township, 179 U. S. 472-494 (45:280); Thompson v. Perrine, 106 U. S. 589-593 (27:298); Lake County v. Dudley, 173 U. S. 243 (43:684); Andes v. Ely, 158 U. S. 132 (39:996); New Orleans v. Quinlan, 173 U. S. 191 (43:664).

¹ Buckner v. Finley, 2 Pet. 586 (7:528); Dickens v. Beal, 10 Pet.

§ 722. **Same—Same—The fact of assignment.**—Whether or not there has been in fact an endorsement and assignment of a promissory note is, as between the original parties, always open to inquiry, and parol evidence is admissible to show the real relation of the parties; and, although the transaction, for the convenience of the parties in carrying out a lawful purpose, has been given the form of an endorsement and assignment, if there was, in fact, no assignment, but the nominal assignee was the first taker of the note and furnished directly the consideration for its execution, and the nominal endorser made the endorsement before delivery, and as a maker, then the provision of the statute does not apply, and the holder of the note may, if diversity of citizenship exists between him and the parties signing the note, maintain suit on it in a federal court without reference to the citizenship of the endorser.²

§ 723. **Same—Several plaintiffs and defendants.**—When it is sought to maintain the jurisdiction of a federal circuit court over a suit upon the ground that it is between citizens of different states, if there are several co-plaintiffs, each plaintiff must be competent to sue, and, if there are several co-defendants, each defendant must be liable to be sued, in that court or the jurisdiction will fail;³ but the rule is not infringed by the fact that, in a suit brought by two plaintiffs against one defendant, between whom and plaintiffs there is diversity of citizenship, the plaintiffs themselves are not citizens of the same state.⁴

§ 724. **Jurisdiction of suits between citizens of a state and foreign states, citizens or subjects.**—The circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, in which there is a controversy between

572 (9:538); *Nelson v. First Nat. Bank*, 69 Fed. R. 800; *Bank of The United States v. Daniel*, 12 Pet. 32-58 (9:989).

² *Holmes v. Goldsmith & Co.*, 147 U. S. 150-164 (37:118); *Blair v. Chicago*, 201 U. S. 400-489 (50:801).

³ *Susquehannah & W. Valley R. Co. v. Blatchford*, 11 Wall. 172-

178 (20:179); *Hoe v. Jamieson*, 166 U. S. 395-399 (41:1049); *Bank v. Slocumb*, 14 Pet. 60-66 (10:354); *Anderson v. Watt*, 138 U. S. 694-708 (34:1078); *Strawbridge v. Curtis*, 3 Cranch, 267 (4:435); *New Orleans v. Winter*, 1 Wheat. 91 (4:444).

⁴ *Sweeney v. Carter Oil Co.*, 199 U. S. 252-259 (50:178).

citizens of a state and foreign states, citizens or subjects, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars;⁵ and the jurisdiction is unaffected by the fact that the foreign citizen resides in this country and in the state of the residence of the adverse party,⁶ or by the fact that he is the consul of a foreign state.⁷ But the circuit courts have no jurisdiction of a suit where both parties are citizens or subjects of a foreign state, unless it be one arising under the constitution or a law or a treaty of the United States;⁸ and an Indian residing in a state of the Union is not, within the meaning of the judiciary acts, a citizen or subject of a foreign state.⁹

§ 725. Same—Corporation created by a foreign state a citizen thereof.—A corporation created by the laws of a foreign state is, within the meaning of the second section of the third article of the federal constitution extending the judicial power of the United States to controversies “between citizens of a state and foreign states, citizens, or subjects,” and within the meaning of the federal judiciary acts distributing that judicial power, a citizen or subject of the foreign state under and by virtue of whose laws it has been created, and is a competent party, either as plaintiff or defendant, to sustain the jurisdiction of a federal circuit court in a suit at law or in equity in which the jurisdiction is based upon the fact that the suit involves a controversy between parties of the character above mentioned; and where such foreign corporation is defendant, the suit may be maintained in a circuit court of the United States in any district in which valid service of process can be made upon such defendant.¹⁰

⁵ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 434.

⁶ *Breedlove v. Nicolet*, 7 Pet. 413 (8:731).

⁷ *Bors v. Preston*, 111 U. S. 252–263 (28:419); *St. Lukes Hospital v. Barclay*, 3 Blatch. 259, Fed. cas. No. 12,241; *Glittings v. Crawford*, 1 Taney, 1.

⁸ *Pooley v. Luco*, 72 Fed. R. 563; *Montalet v. Murray*, 4 Cranch, 46–48 (2:545); *Jackson v. Twentyman*, 2 Pet. 136 (7:374); *Laird v.*

Indemnity Mutual Marine Assur. Co., 44 Fed. R. 712; *Johnson v. Accident Ins. Co.*, 35 Fed. R. 376; *Lacroix v. Lyons*, 27 Fed. R. 403; *Hodgson v. Thompson*, 3 Cranch, 303–304 (3:108).

⁹ *Karrahoo v. Adams*, 1 Dill. 344, Fed. cas. No. 7,614; *Paul v. Chissoque*, 70 Fed. R. 401.

¹⁰ *Barrow Steamship Co. v. Kane*, 170 U. S. 100–113 (42:964); *Re Hohorst*, 150 U. S. 653–664 (37:1211); *National Steamship Co. v.*

§ 726. Jurisdiction of suits in which the United States are plaintiffs.—The circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at law or in equity, in which the United States are plaintiffs or petitioners, without regard to the sum or value of the matter in dispute.¹¹

§ 727. Jurisdiction founded on claim to lands under grant of different states.—The circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature, at law or in equity, in which there is a controversy between citizens of the same state, claiming lands under grants of different states, without regard to the sum or value of the matter in dispute.¹²

§ 728. The amount in dispute—In what classes of cases the jurisdictional sum or value of two thousand dollars is necessary to maintain jurisdiction.—It is within the competency of congress, in distributing to the circuit courts the judicial power, to make the jurisdiction in any class of cases depend upon a specified sum or value, and to vest jurisdiction in other classes of cases without regard to the amount in controversy; and that policy has been followed in the judiciary act now in force, defining the jurisdiction of the circuit courts which they exercise concurrently with the courts of the several states. That act vests the circuit courts with jurisdiction over five classes of cases, and in three of the classes it is an essential element of the jurisdiction that the matter in dispute shall exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and in two of the classes the jurisdiction is vested without regard to the sum or value in controversy.

The three classes of cases in which the jurisdictional sum or value of two thousand dollars is requisite are: (1) Suits of a civil nature at common law or in equity arising under the constitution or laws of the United States, or treaties made or which

Tugman, 106 U. S. 118-123 (27: 87).

¹¹ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 494 (40:508); *United States Fidelity & Guaranty Co. v. United States*, 203 U. S. 204-349 (51:516); *United States v.*

Shaw, 39 Fed. R. 433, 3 L. R. A. 232; *United States v. Kentucky River Mills*, 45 Fed. R. 273; *United States v. Reid*, 90 Fed. R. 522.

¹² 25 U. S. Stat. at L. ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 494 (40:508).

shall be made under their authority; (2) suits of a civil nature at common law or in equity in which there shall be a controversy between citizens of different states; and (3) suits of a civil nature at common law or in equity in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects.

The two classes of cases in which the jurisdiction is given without regard to the sum or value of the matter in dispute are: (1) Suits of a civil nature at common law or in equity in which the United States are plaintiffs or petitioners; and (2) suits of a civil nature at common law or in equity in which there shall be a controversy between citizens of the same state claiming lands under grants of different states.¹³

§ 729. Same—Rules for determining the amount in dispute
The determination of what is the amount in dispute, within the meaning of the federal judiciary acts, often presents questions of some intricacy and difficulty, and the subject has called forth many decisions of the supreme court, in which some legal rules have been declared for the guidance of the courts of original jurisdiction; but, notwithstanding those learned decisions, giving construction to the jurisdictional clause of the judiciary acts, and the formulation and announcement of legal rules, the difficulties of the subject still abide with us and are a constant source of litigation. In defining the amount in controversy within the meaning of the judiciary act defining the jurisdiction of the circuit courts, the supreme court applies to the question the same legal rules and principles which it applied to the determination of the same question arising under the legislation defining its own appellate jurisdiction during the long series of years when that jurisdiction was made to depend upon a specified sum or value, and the decisions of the court upon the amount in controversy as to its own jurisdiction are cited by it in questions arising out of the amount in controversy in regard to the jurisdiction of the circuit court; and it is, therefore, established that the legal rules and principles applied in determining the amount in controversy in the circuit courts are pre-

¹³ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 434; *United States v. Sayward*, 160 U. S. 493-498 (40:508); *Fishback v. Western Union Tel. Co.*, 161 U. S. 96-101 (40:630); *Holt v. Indiana Mnfg. Co.*, 176 U. S. 68-73 (44:374).

cisely the same as those applied to the determination of the same question in the supreme court, and the adjudicated cases are indiscriminately cited and apply to the question in relation to the jurisdiction of both courts.¹⁴ The rules of the common law distinguishing between joint and several causes of action and joint and several liability are also applied to the determination of the question.¹⁵

¹⁴ *Walter v. Northeastern Railroad Co.*, 147 U. S. 370-375 (37:206); *Northern Pac. R. Co. v. Walker*, 148 U. S. 391-392 (37:494); *Davis v. Schwartz*, 155 U. S. 631-647 (39:289); *Fishback v. Western Union Tel. Co.*, 161 U. S. 96-101 (40:630); *Citizens' Bank of Louisiana v. Cannon, sheriff*, 164 U. S. 319-324 (41:451); *Texas & Pac. R. Co. v. Gentry*, 163 U. S. 353-368 (41:186); *McDaniel v. Taylor*, 196 U. S. 415-431 (49:533); *Wheless v. St. Louis*, 180 U. S. 379 (45:583).

¹⁵ *Green v. Litter*, 8 Cranch, 229-251 (3:545); *Tupper v. Wise*, 110 U. S. 398 (28:189); *Lynch v. Bailey*, 110 U. S. 400 (28:190); *Friend v. Wise*, 111 U. S. 797 (28:602).

In *Green v. Litter*, *supra*, the supreme court, speaking through Mr. Justice Story, and answering a certified question, can the demandant join in the writ and count several tenants claiming under several distinct, separate and independent original titles, all of which interfere with the land of the demandant? said:

"As to the second question, we are of opinion that, at common law, a writ of right will not lie, except against the tenant of the freehold demanded. If there are several tenants claiming several parcels of land by distinct titles, they cannot lawfully be joined in one writ. If the demandant demands against any tenant more

land than he holds, he may plead non-tenure as to the parcel not holden; and this plea, by the ancient common law, would have abated the whole writ. But the statute 25 Edw. 3 (St. 5, ch. 16), which may be considered a part of our common law, having been in force at the emigration of our ancestors, cured the defect, and declared that the writ should abate only as to the parcel whereof non-tenure was pleaded, and admitted or proved." And after stating that the state of Kentucky, where the case arose, had enacted substantially the statute of Edward, Justice Story continued: "At common law, in many instances, if the party demanded in his writ more than he proved was his right, he lost the action by the falsity of his writ. It was to cure this ancient evil that the act of Kentucky was made. It enables the party to recover, although he should prove only part of the claim in his declaration. But it does not intend to enable him to join parties in an action who could not be joined at the common law. It could no more entitle a demandant in a real action to recover against several tenants claiming by separate and distinct titles, than it could entitle a plaintiff to maintain a joint action of assumpsit, where the contracts were several and inde-

§ 730. Same—Same—Rule when amount is to be determined from the face of a pleading.—It is settled that when the amount in controversy is to be determined from the face of a pleading, if from the nature of the case stated in the pleading there could not legally be a judgment recovered for the jurisdictional amount, the court cannot take jurisdiction, although the damages be laid in the declaration at a larger sum; but if upon the case stated there could legally be a recovery for the amount necessary to confer jurisdiction, and that amount is claimed by the plaintiff, then, upon an inspection of the pleading, the plaintiff's allegations control and the jurisdiction of the court will attach.¹⁶

§ 731. Same—Same—Same—Cases justifying exemplary damages.—If the plaintiff's declaration states a case which, in law, justifies the recovery of exemplary damages, and claims an amount sufficient to give the court jurisdiction, and the amount in dispute is to be determined from the face of the pleading, then, in such case, the allegations and claim of plaintiff are, for jurisdictional purposes, controlling and give the court jurisdiction, although it appears from the declaration that the claim for damages is greatly in excess of his actual, direct and immediate pecuniary loss caused by the wrongful acts of defendant, and the recovery upon a trial upon the merits is very much less than the jurisdictional amount.¹⁷

§ 732. Same—Same—Rule when amount is to be determined upon an issue of fact.—When the amount in dispute is to be ascertained upon an issue of fact raised by a plea to the jurisdiction or a motion to dismiss for want of jurisdiction, stating that the amount of damages laid in the declaration are colorable and have been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case within the jurisdiction of the court, and that the suit does not really and

pendent. Infinite inconvenience and mischief would result from such a construction; and we should not incline to adopt it unless it were unavoidable."

¹⁶ Barry v. Edmunds, 116 U. S. 550-566 (29:729); Vance v. Vandercook, 170 U. S. 468-481 (42:1111); North American Transp. &

T. Co. v. Morris, 178 U. S. 262-269 (44:1061); Scott v. Donald, 165 U. S. 58-89 (41:632); Wiley v. Sinkler, 179 U. S. 58 (45:84); Globe Ref. Co. v. Landa Cotton Oil Co., 190 U. S. 540 (47:1171).

¹⁷ Barry v. Edmunds, 116 U. S. 550-566 (29:729); Scott v. Donald, 165 U. S. 58-107 (41:632).

substantially involve a dispute or controversy properly within the jurisdiction of the court, then the rule is that the court must proceed upon ascertained facts established according to the fixed rules of evidence, and the court must find as a matter of fact, upon evidence legally sufficient, that the amount of damages laid in the declaration was colorable, and laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case within the jurisdiction of the court; and, in the absence of such finding, the allegations and claim of the plaintiff, being legally sufficient to justify a recovery equal to the jurisdictional amount, will control and give the court jurisdiction.¹⁸

§ 733. Same—Same—Rule when there are several parties plaintiffs or defendants.—When two or more plaintiffs join in one suit, each suing upon a separate and distinct cause of action, or upon a separate and distinct title, upon which each might have sued in separate actions, then, and in such case, the matter in dispute as to each plaintiff, upon his separate and distinct cause of action or title, must, in order to maintain the jurisdiction as to him, exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and the sum or value of the separate claims of the different plaintiffs cannot be added together to make up the jurisdictional amount; and when two or more defendants are sued in one suit, each being sued upon a separate and distinct cause of action, or upon a separate and distinct title, upon which each might have been sued in a separate action, then, and in such case, the matter in dispute as to each defendant, upon the separate and distinct cause of action or title upon which he is sued, must, in order to maintain the jurisdiction of the court as to him, exceed, exclusive of interest and costs, the sum or value of two thousand dollars, and the sum or value of the separate claims of the different defendants cannot be added together to make up the jurisdictional amount.¹⁹ But where two or more plaintiffs claim under the same title or cause

¹⁸ *Barry v. Edmunds*, 116 U. S. 550-566 (29:729); *Wetmore v. Ryner*, 169 U. S. 115-128 (42:682); *Deputron v. Young*, 134 U. S. 241-260 (33:923); *Scott v. Donald*, 165 U. S. 58-107 (41:632); *Smithers v. Smith*, 204 U. S. 632-646 (51:

565); 1 *Bates Fed. Eq. Proc.* secs. 250, 251, 253.

¹⁹ *Walter v. Northeastern R. Co.*, 147 U. S. 370-375 (37:206); *Northern Pac. R. Co. v. Walker*, 148 U. S. 391-392 (37:494); *Flashback v. Western Union T. Co.*, 161

of action, and the determination of the suit necessarily involves the validity of the title or action sued on, then in such case the jurisdiction will be maintained as to all of the plaintiffs, if the aggregate of the matters in dispute as to all of them exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, even though the claim of no one of them is equal to or exceeds the jurisdictional amount; and when two or more defendants, having separate interests are sued upon a joint title or a joint cause of action, upon which they are all jointly liable, and the determination of the suit necessarily involves the validity of that title or cause of action, and the enforcement of their joint liability, then, in such case, the court has jurisdiction as to all of the defendants if the aggregate of the matters in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, although the claim of no one of them exceeds that amount.²⁰

§ 734. **Same—Same—When interest is a principal demand, and when an accessory demand.**—The federal judiciary act, in fixing the jurisdictional amount, requires that the matter in dispute must exceed, “exclusive of interest and costs, the sum or value of two thousand dollars;” but interest may be, according to the circumstances of the case, a principal demand, or an accessory demand, and when it takes the character of the former it should be estimated as a part of the principal debt, and so estimated in determining the amount in dispute, whilst interest as an accessory demand can never be computed in determining the jurisdiction.²¹ The distinction between interest as a principal and as an accessory demand, is aptly illustrated by cou-

U. S. 96-101 (40:630); *Citizens' Bank of Louisiana v. Cannon, Sheriff*, 164 U. S. 319-324 (41:451); *Gibson v. Shufeldt*, 128 U. S. 27-40 (30:1083); *Davis v. Schwartz*, 155 U. S. 631-647 (39:289); *Wheless v. St. Louis*, 180 U. S. 379-383 (45:583); *Friend v. Wise*, 111 U. S. 797 (28:602).

²⁰ *McDaniel v. Taylor*, 196 U. S. 415-431 (49:533); *Shields v. Thomas*, 17 How. 3-6 (15:93); *Overby v. Gordon*, 177 U. S. 214-229 (44::741); *Clay v. Field*, 138

U. S. 464-483 (34:1044); *Washington Market Co. v. Hoffman*, 101 U. S. 112 (25:782); *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42-60 (36:66); *Texas & Pacific R. Co. v. Gentry*, 163 U. S. 353-368 (41:186); *Tupper v. Wise*, 110 U. S. 398 (21:189); *Lynch v. Bailey*, 110 U. S. 400 (28:190).

²¹ *Edwards v. Bates County*, 163 U. S. 269-273 (41:155); *Green County v. Kortrech*, 81 Fed. 241; *Brown v. Webster*, 156 U. S. 328-330 (39:440).

pons attached to negotiable bonds. Coupons are written contracts for the payment of a definite sum of money on a given day, and being drawn and executed in a form and mode that they may be separated from the bond, they are negotiable instruments, and a suit may be maintained on them without the necessity of producing the bonds to which they were attached. Each matured coupon upon a negotiable bond is a separable promise, distinct from the promise to pay the bond or other coupon, and gives rise to a separate cause of action. Not only may a suit be maintained upon an unpaid coupon in advance of the maturity of the principal debt, but the holder of such coupon is entitled to recover interest thereon from its maturity. It results, logically, that when the interest evidenced by a coupon has become due and payable, the demand based upon the promise contained in it has ceased to be a mere incident of the principal indebtedness represented by the bond, and has itself become a principal obligation. It has, therefore, been held that in determining the amount in dispute, in a suit on a negotiable bond, the amount of the matured interest coupons attached to the bond may be added to the bond as a part of the principal debt.²² It has also been held that in an action for damages for a breach of warranty of title of land, interest on the amount of money paid by plaintiff for the land is a principal demand and a part of his damages to be added to the price paid in determining the matter in dispute, and whether or not that amount is sufficient to give the court jurisdiction.²³

§ 735. Same—Jurisdictional amount not required in ancillary suits.—The jurisdictional amount specified in section one of the present judiciary act applies to suits commenced by original process, and not to ancillary suits; for, in the latter class of suits, the court has jurisdiction without regard to the sum or value in dispute, or the citizenship of the parties or the nature of the suit. An ancillary suit is a dependency upon some other suit or proceeding commenced, by original process, and in which the jurisdictional facts existed, and the jurisdiction of the court based on those facts extends to and supports the authority of the court over the dependent suit or proceeding, the very idea of ancillary jurisdiction embodying the principle of a continuity

²² *Edwards v. Bates County*, 163 U. S. 269-273 (41:155).

²³ *Brown v. Webster*, 156 U. S. 328-330 (49:440).

of judicial authority over the parties, or the subject-matter, or both, having its inception in the original suit.²⁴

§ 736. **Jurisdiction once vested is not ousted by subsequent events.**—It is a principle of universal application, and absolutely essential to the efficient administration of justice, that the jurisdiction of a court depends upon the state of things existing at the time when the action is brought, or the jurisdiction invoked, and after jurisdiction has once vested it cannot be ousted by subsequent events;²⁵ and it has been uniformly held that when jurisdiction of a suit has once been acquired by a court of the United States on the ground of the requisite diversity of citizenship, it is not lost or ousted by a change in the citizenship of either party pending the suit.²⁶

(c) **THE COMMON LAW AND EQUITY JURISDICTION OF THE CIRCUIT COURTS OF THE UNITED STATES UNDER SPECIAL STATUTES.**

§ 737. **Suits at common law by the United States or officers thereof.**—The circuit courts have original jurisdiction, concurrent with the district courts, of all suits at common law where the United States, or any officer thereof suing under the authority of any act of congress, are plaintiffs, without regard to the amount in controversy.²⁷

²⁴ *White v. Ewing*, 159 U. S. 36 (40:67); *New Orleans v. Fish*, 180 U. S. 185 (45:485); *Stillman v. Combe*, 197 U. S. 436-442 (49:822), S. C., 29 C. C. A. 660, 86 Fed. R. 202; *Julian v. Central Trust Co.*, 193 U. S. 93-114 (48:629); *Riverdale Cotton Mills v. Alabama & G. Mfg. Co.*, 198 U. S. 188-202 (49:1008); 1 *Bates Fed. Eq. Proc.* sec. 97, and authorities there cited.

²⁵ *Mollan v. Torrance*, 9 Wheat. 537-541 (6:154).

²⁶ *Louisville, N. A. & C. Ry. Co. v. Louisville Trust Co.*, 174 U. S. 552-577 (43:1081); *Morgan v. Morgan*, 2 Wheat. 290 (4:242); *Clark v. Mathewson*, 12 Pet. 164

(9:1041); *Koenigsberg v. Richmond Silver Min. Co.*, 158 U. S. 41 (39:889); *Dunn v. Clarke*, 8 Pet. 1 (8:845).

²⁷ U. S. Rev. Stat. art. 629, cl. 3; 4 Fed. Stat. Anno. 246; U. S. Comp. Stat. 1901, p. 503; *Price, Receiver, v. Abbott*, 17 Fed. R. 506; *Hendee v. Railroad Co.*, 26 Fed. R. 677; *Stephens v. Bernays*, 41 Fed. R. 401; *Frelinghuysen v. Baldwin*, 12 Fed. R. 395; *Armstrong v. Ettlesohn*, 36 Fed. R. 209; *Fisher v. Yoder*, 53 Fed. R. 565; *Meyers v. Hittinger*, 94 Fed. R. 370; *Aldrich v. Campbell*, 97 Fed. R. 663; *Henry v. Sowles*, 28 Fed. R. 481; *Stanton v. Wilkinson*, 8 Ben. 357, Fed. Cas. 13,299; *Schofield v.*

§ 738. Same—Suits by receivers of national banks.—Appointments of receivers of insolvent national banks, made by the comptroller of the currency, for the purpose of winding up the affairs of such banks, as provided by the national banking act, are presumed to be made with the concurrence and approval of the secretary of the treasury, and are made by the head of a department, within the meaning of the constitution; and the receiver, being appointed pursuant to an act of congress to execute duties prescribed by the act, is, in the execution of those duties, an agent and officer of the United States, and actions brought by him to recover assessments duly laid upon the stockholders, and necessary to provide for the payment of the debts of the bank, and actions to collect the assets of the bank from its delinquent debtors, are suits at common law brought by an officer of the United States, suing under the authority of an act of congress, of which the circuit courts and district courts have concurrent jurisdiction, without regard to the citizenship of the parties or the amount in controversy.²⁸

§ 739. Same—Action of debt on postmaster's bond.—The circuit courts have original jurisdiction, concurrent with the district courts, of an action of debt brought by the postmaster-general, against a postmaster on his official bond.²⁹

§ 740. Suits at law or in equity arising under the revenue laws. The circuit courts are vested with jurisdiction of all suits

Palmer, 134 Fed. R. 753; Gibson v. Peters, 150 U. S. 342-348 (37:1104); Pacific Nat. Bank v. Mixer, 114 U. S. 463 (29:221); Brown v. Smith, 88 Fed. R. 565; Speckar v. German Nat. Bank, 85 Fed. R. 12; Thompson v. Pool, 70 Fed. R. 725; Yardley v. Dickson, 47 Fed. R. 835; Armstrong v. Trautman, 36 Fed. R. 275; Platt v. Beach, 2 Ben. 303, Fed. Cas. 11,215; McCouville v. Gilmour, 36 Fed. R. 849.

²⁸ Price, Receiver v. Abbott, 17 Fed. R. 506; Hendee, Receiver v. Railroad Co., 26 Fed. R. 677; Stephens v. Bernays, 41 Fed. R. 401; Frølinghuysen v. Baldwin, 12 Fed. R. 395; Armstrong v. Ettlesohn, 36 Fed. R. 209; Fisher v.

Yoeder, 53 Fed. R. 565; Thompson v. Pool, 70 Fed. R. 725; Short v. Hepburn, 75 Fed. R. 113; Brown v. Smith, 88 Fed. R. 565; Meyers v. Hittinger, 94 Fed. R. 370; Aldrich v. Campbell, 97 Fed. R. 663; Platt v. Beach, 2 Ben. 303, Fed. Cas. 11,215; Stanton v. Wilkeson, 8 Ben. 357, Fed. Cas. 13,299; Gibson v. Peters, 150 U. S. 342-348 (37:1104).

²⁹ Postmaster-General v. Early, 12 Wheat. 136 (6:577); Dox v. Postmaster-General, 1 Pet. 323 (7:162); Postmaster-General v. Furber, 4 Mason, 333, Fed. Cas. 11,308; United States v. Green, 4 Mason, 434, Fed. Cas. 15,258.

at law or in equity, arising under any act providing for revenue from imports or tonnage, except civil causes of admiralty and maritime jurisdiction, and seizures on land or on waters not within the admiralty and maritime jurisdiction, and except suits for penalties and forfeitures; and also jurisdiction of all suits at law and in equity arising under any law providing for internal revenue.³⁰

§ 741. **Same—Revenue law defined.**—A revenue law, within the meaning of the federal laws defining the jurisdiction of the federal courts, is a law enacted under and by virtue of the power granted to congress by section 8, Art. I, of the constitution, “to lay and collect taxes, duties, imposts, and excises,” imposing duties on imports or tonnage, or providing in terms for the raising of revenue.³¹

§ 742. **Same—Suit in equity to enforce internal revenue tax lien.**—Internal revenue taxes assessed and levied by the United States are a lien upon all the property, real and personal, of any person liable to pay, and who neglect or refuse to pay the same on demand; and the circuit courts have jurisdiction, concurrent with the district courts, of a bill in equity to enforce such lien.³²

§ 743. **Suits arising under the postal laws.**—The circuit courts are vested with jurisdiction, concurrent with the district courts, of all suits at law or in equity arising under the postal laws of the United States.³³

§ 744. **Same—Suits to recover money wrongfully or fraudulently paid out by post-office department.**—In all cases where money has been paid out of the funds of the post-office depart-

³⁰ U. S. Rev. Stat. sec. 629, cl. 4; 4 Fed. Stat. Anno. 246; U. S. Comp. Stat. 1901, p. 503; U. S. v. Hill, 123 U. S. 681-686 (31:275); De Lima v. Bedwell, 182 U. S. 1-220 (45:1041); Downes v. Bedwell, 182 U. S. 244-391 (45:1088); Spreckels Sugar Ref. Co. v. McClain, 192 U. S. 397-418 (48:496).

³¹ U. S. v. Hill, 123 U. S. 681-686 (31:274); U. S. v. Hopewell, 51 Fed. R. 800.

³² U. S. Rev. Stat. sec. 3207; 3

Fed. Stat. Anno. 576-592; U. S. Comp. Stat. 1901, p. 2081; Alkan v. Bean, 8 Biss. 83; U. S. v. Snyder, 149 U. S. 210-215 (37:709).

The taxing system of the United States is not subject to the recording laws of the states. U. S. v. Snyder, *supra*.

³³ U. S. Rev. Stat. sec. 563, cl. 7; *ib.* 629, cl. 4; 4 Fed. Stat. Anno. 220, 246; U. S. Comp. Stat. 1901, pp. 457, 503.

ment under the pretense that service has been performed therefor, when, in fact, such service has not been performed, or as additional allowances for increased services actually rendered, when the additional allowance exceeds the sum which, according to law, might rightfully have been allowed therefor, and in all other cases where money of the department has been paid to any person in consequence of fraudulent representations, or by the mistake, collusion, or misconduct of any officer or other employe in the postal service, the postmaster-general shall cause suit to be brought to recover such wrongful or fraudulent payment or excess, with interest thereon;³⁴ and the circuit courts have jurisdiction of such suits.³⁵

§ 745. Same—Suit in equity to set aside fraudulent conveyances.—The circuit courts have jurisdiction, concurrent with the district courts, upon the direction of the department of justice, of bills in equity, to set aside fraudulent conveyances or trusts, and to exercise any other legitimate powers of a court of equity, for the purpose of obtaining satisfaction of any judgment for money due the post-office department, when proceedings at law for the collection of such judgment have proved unavailing.³⁶

§ 746. Suits for recovery of penalties for violation of laws regulating carriage of passengers in merchant vessels.—The circuit courts are vested with jurisdiction of all suits and proceedings for the enforcement of any penalties provided by the laws regulating the carriage of passengers in merchant vessels.³⁷

§ 747. Condemnation of property used in aid of insurrection. The circuit courts of the United States have jurisdiction of all suits and proceedings for the condemnation of any property, real or personal, used or employed in aid of any insurrection against the government of the United States, and taken as prize

³⁴ U. S. Rev. Stat. sec. 4057; 5 Fed. Stat. Anno. 954; U. S. Comp. Stat. 1901, p. 2756; Wisconsin Central R. Co. v. U. S., 164 U. S. 190-212 (41:399); U. S. v. Barlow, 132 U. S. 271-282 (33:346); U. S. v. Platt, 157 U. S. 113-121 (39:639); U. S. v. Sanborn, 35 U. S. 271-286 (34:112).

³⁵ U. S. v. Barlow, 132 U. S. 271-

282 (33:346); U. S. v. Platt, 157 U. S. 113-121 (39:639); U. S. v. Sanborn, 35 U. S. 271-286 (34:112).

³⁶ U. S. Rev. Stat. sec. 382; 4 Fed. Stat. Anno. 773; U. S. Comp. Stat. 1901, p. 213.

³⁷ U. S. Rev. Stat. sec. 629, cl. 5; 4 Fed. Stat. Anno. 247; U. S. Comp. Stat. 1901, p. 504.

in pursuance of section fifty-three hundred and eight, title, Insurrection, of the United States Revised Statutes.³⁸

§ 748. **Suits arising under laws relating to slave trade.**—The circuit courts have jurisdiction of all suits arising under any law relating to the slave trade.³⁹

§ 749. **Suits by assignees of debentures.**—The circuit courts have jurisdiction, concurrent with the district courts, of all suits by the assignee of any debenture for drawback of duties, issued under any law for the collection of duties, against the person to whom such debenture was originally granted, or against any indorser thereof, to recover the amount of such debenture.⁴⁰

§ 750. **Suits arising under the patent laws of the United States.**—The circuit courts are vested with jurisdiction, exclusive of the courts of the several states and the federal district courts, of all suits at common law or in equity arising under the patent-right laws of the United States, without regard to the sum or value in dispute or the citizenship of the parties.⁴¹

§ 751. **Same—Defined.**—A case arising under the patent-right laws is one in which the plaintiff in his opening pleading—be it a bill, complaint, or declaration—in his statement of his cause of action, sets up a right under the patent laws as a ground of recovery. There is a clear distinction between a *case* and a *question* arising under the patent laws; the latter may appear in the plea or answer of the defendant, or in the evidence.⁴²

³⁸ U. S. Rev. Stat. 629, cl. 6; 4 Fed. Stat. Anno. 247-248; U. S. Comp. Stat. 1901, p. 504; U. S. Rev. Stat. sec. 5308; *Union Ins. Co. v. U. S.*, 6 Wall. 759-766 (18:879); *Armstrong Foundry v. U. S.*, 6 Wall. 766-770 (18:882); *Confiscation Cases*, 7 Wall. 454-463 (19:196).

³⁹ U. S. Rev. Stat. sec. 629, cl. 7; 4 Fed. Stat. Anno. 248; U. S. Comp. Stat. 1901, p. 504; *Couillard v. U. S.*, 2 Wall. 366-375 (17:906); *Morris v. U. S.*, 2 Wall. 375-383 (17:909); *Coggeshall v. U. S.*, 2 Wall. 383-404 (17:911).

⁴⁰ U. S. Rev. Stat. sec. 629, cl. 8; 4 Fed. Stat. Anno. 248; U. S.

Comp. Stat. 1901, p. 504; U. S. Rev. Stat. secs. 3015-3043; 2 Fed. Stat. Anno. 731-737; U. S. Comp. Stat. 1901, pp. 1989-2000.

⁴¹ U. S. Rev. Stat. sec. 629, cl. 9; *ib.*, sec. 711, cl. 5; 4 Fed. Stat. Anno. 248, 494; U. S. Comp. Stat. 1901, p. 504, 578; *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282-295 (46:910); *White v. Rankin*, 144 U. S. 628-639 (36:569); *Evans v. Eaton*, 3 Wheat. 454 (4:433).

⁴² *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255-262 (42:458); *Excelsior Wooden Pipe Co. v. Pacific Bridge Co.*, 185 U. S. 282-295 (46:910); *Atherton Match*

§ 752. **Same—Bill in equity to enjoin infringement.**—A bill in equity, filed in a circuit court of the United States, alleging ownership, either as patentee or assignee of a patent, and that defendant has infringed it, and praying for a perpetual injunction against the infringement, and for an account of profits, and an assessment of damages, is a suit arising under the patent-right laws, and within the exclusive jurisdiction of the circuit court; and where the bill is an ordinary one for infringement, and the defendant's answer puts in issue the title of the plaintiff to sue, the jurisdiction is not ousted by an allegation in the bill that a license previously granted to defendant has been revoked, and the court is at liberty to go on and determine that issue.⁴³

§ 753. **Same—Same—Bill for naked accounting not maintainable.**—A bill in equity for a naked accounting of profits and damages against an infringer of a patent cannot be sustained, for the reason that plaintiff has a plain, adequate and complete remedy at law, such accounting not being allowable except as an incident to some recognized head of equitable jurisdiction which secures to the patentee his standing in a court of equity.⁴⁴

§ 754. **Same—Trespass on the case for infringement.**—An action of trespass on the case by the patentee, assignee or grantee to recover damages for the infringement of a patent is an action arising under the patent-right laws of the United States, and the circuit courts have jurisdiction without regard to the amount in dispute or the citizenship of the parties; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs of suit.⁴⁵

Co. v. Atwood-Morris Co., 43 C. C. A. 72.

⁴³ White v. Rankin, 144 U. S. 628-639 (36:569); Excelsior Wooden Pipe Co. v. Pacific Bridge Co., 185 U. S. 282-295 (46:910); Littlefield v. Perry, 21 Wall. 205 (22:572); Warren v. Keep, 155 U. S. 265-270 (39:144).

⁴⁴ Root v. Lake Shore & M. S. R. Co., 105 U. S. 189 (26:975); Hayward v. Andrews, 106 U. S. 672 (27:322); Waterman v. Mackenzie, 138 U. S. 252 (34:923).

⁴⁵ U. S. Rev. Stat. sec. 4919; 29 U. S. Stat. at L. ch. 395, p. 695; Coupe v. Royer, 155 U. S. 565-585 (39:263); Tucker v. Spalding, 13

§ 755. **Same—Suits arising out of contracts in relation to patents.**—Suits to compel the specific performance of contracts for the use or assignment of patents, or for the annulment or cancelation of such contracts, or suits to recover upon contracts for the amount of an agreed license or royalty, or to recover upon any other contract defining or controlling the rights of parties in relation to or concerning patents, are suits arising upon or out of contracts, and are not suits arising under the patent-right laws of the United States; and such suits not only may, but must be brought in the state courts, unless the circuit courts can take jurisdiction of them on the ground of diversity of citizenship and the existence of the jurisdictional amount, as provided in the judiciary act defining the jurisdiction of those courts, concurrent with the courts of the several states.⁴⁶

§ 756. **Same—Suit to enjoin collection of taxes levied on patent rights.**—A bill in equity to enjoin the collection of taxes upon the ground that the assessment was illegal because in effect levied on patents or patent-rights, does not involve the construction or validity or infringement of the patents involved, nor of any other question under the patent laws, and is not a suit arising under those laws, and, therefore, the circuit court has no jurisdiction of such bill on that ground.⁴⁷

§ 757. **Suits arising under the copyright laws of the United States.**—The circuit courts are vested with original jurisdiction, exclusive of the courts of the several states, of all suits at law or in equity arising under the copyright laws of the United States. A suit is said to arise under those laws when the plaintiff, in his petition, declaration or bill, in the statement of his cause of action, claims a right under them.⁴⁸

Wall. 453 (20:215); *Keys v. Grout*, 118 U. S. 36 (30:57).

⁴⁶ *Pratt v. Paris Gaslight & Coke Co.*, 168 U. S. 255-262 (42:458); *Hartell v. Tillman*, 99 U. S. 547 (25:357); *Wilson v. Sanford*, 10 How. 99 (13:344); *Albright v. Teas*, 106 U. S. 613 (27:295); *Goodyear v. Day*, 1 Blatchf. 565, Fed. Cas. No. 5,586; *Banchard v. Sprague*, 1 Cliff. 288, Fed. Cas. No. 1,516; *Dale Tile Mfg. Co. v. Hyatt*, 125 U. S. 46 (31:683); *Wade v.*

Lowder, 165 U. S. 624 (41:851); *Walter A. Wood Mowing & R. Machine Co. v. Skinner*, 139 U. S. 293 (35:193); *Re Ingalls*, 139 U. S. 548 (35:266); *Marsh v. Nichols*, 140 U. S. 344 (35:413); *Brown v. Shannon*, 20 How. 55-58 (15:826); *McMullen v. Bowser*, 102 Fed. R. 497; *Kurtz v. Strauss*, 100 Fed. R. 800.

⁴⁷ *Holt v. Indiana Mfg. Co.*, 176 U. S. 68-73 (44:374).

⁴⁸ *Backus v. Gould*, 7 How. 798

§ 758. Same—Jurisdiction of district courts in suits to recover penalties.—The district courts have jurisdiction of all suits for the recovery of penalties and forfeitures incurred under any law of the United States;⁴⁹ and, therefore, they have jurisdiction, concurrent with the circuit courts for the recovery of those penalties and forfeitures imposed by the copyright laws for an infringement of copyrighted works.⁵⁰

§ 759. Same—Action of debt for penalties.—Pecuniary penalties imposed by the copyright laws are, like all such penalties imposed by all other statutes, recoverable in an action of debt in a court of law, in which the defendant is entitled to a trial by jury;⁵¹ and such penalties cannot be recovered in a suit in equity,⁵² it being a rule of such courts not to enforce a penalty or a forfeiture, or anything in the nature of either.⁵³

§ 760. Suits by the United States or officers against national banking associations.—The circuit courts are vested with jurisdiction of all suits commenced by the United States, or by direction of any officer thereof, against any national banking association, and all suits for winding up the affairs of any national bank, without regard to the citizenship of the parties or the sum or value of the matter in dispute.⁵⁴

§ 761. Suits by national banks to enjoin the comptroller of the currency.—The circuit courts are vested with jurisdiction of all suits brought by any banking association established in the district for which the court is held, under the provisions

(12:919); *Brady v. Daly*, 175 U. S. 148 (44:109); *Bolles v. Outing Co.*, 175 U. S. 262-268 (44:156); U. S. Rev. Stat. secs. 629, cl. 9 and 711; 4 Fed. Stat. Anno. 248, 494; U. S. Comp. Stat. 1901, pp. 504, 578.

⁴⁹ U. S. Rev. Stat. sec. 563, cl. 3; 4 Fed. Stat. Anno. 219; U. S. Stat. Comp. 1901, p. 456.

⁵⁰ *Thornton v. Schrieber*, 124 U. S. 612-621 (31:577) (brought in district court); *Bolles v. Outing Co.*, 175 U. S. 262-268 (44:156) (brought in circuit court).

⁵¹ *Backus v. Gould*, 7 How. 798 (12:919); *Bolles v. Outing Co.*,

175 U. S. 262-268 (44:156); *Thornton v. Schrieber*, 124 U. S. 612-621 (31:577).

⁵² *Stevens v. Gladding*, 17 How. 447 (15:155); *Callaghan v. Myers*, 128 U. S. 617 (32:547).

⁵³ *Marshall v. Vicksburg*, 15 Wall. 146 (21:121); *Horsburg v. Baker*, 1 Pet. 232 (7:125); *Livingston v. Tompkins*, 4 Johns. Ch. 415.

⁵⁴ 25 U. S. Stat. at L. ch. 866, sec. 4, p. 436; 5 Fed. Stat. Anno. 193-195; *Lake National Bank v. Wolfeborough Bank*, 78 Fed. R. 51; *Speckart v. German National Bank*, 85 Fed. R. 12.

of title "The National Banks," to enjoin the comptroller of the currency, or any receiver acting under his direction, as provided in said title, without regard to the citizenship of the parties, or the sum or value of the matter in dispute.⁵⁵

§ 762. **Suits for injuries done under the revenue laws of the United States.**—The circuit courts have jurisdiction of all suits brought by any person to recover damages for any injury to his person or property on account of any act done by him, under any law of the United States for the protection or collection of any of the revenues thereof.⁵⁶

§ 763. **Suits to enforce the right of citizens to vote.**—The circuit courts are vested with jurisdiction of all suits to enforce the right of citizens of the United States to vote in the several states.⁵⁷

§ 764. **Suits to redress deprivation of rights secured by the constitution and laws of the United States.**—The circuit courts have jurisdiction, concurrent with the district courts, but exclusive of the state courts, of all suits at law or in equity authorized by law⁵⁸ to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom or usage, of any state, of any right, privilege or immunity secured by the constitution of the United States, or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.⁵⁹ The jurisdiction here given is evidently based on section nineteen hundred and seventy-nine of the Revised Statutes, and it seems doubtful whether that section is now in force.⁶⁰

⁵⁵ U. S. Rev. Stat. sec. 629, cl. 11; 4 Fed. Stat. Anno. 248; U. S. Stat. Comp. 1901, p. 505; U. S. Rev. Stat. sec. 5237; 5 Fed. Stat. Anno. 179, 180; U. S. Stat. Comp. 1901, p. 3509.

⁵⁶ U. S. Rev. Stat. sec. 629, cl. 12; 4 Fed. Stat. Anno. 248; U. S. Stat. Comp. 1901, p. 505; Crawford v. Johnson, 1 Dedy, 457, Fed. Cas. No. 3,369.

⁵⁷ U. S. Rev. Stat. sec. 629, cl. 12; 4 Fed. Stat. Anno. 248; U. S. Stat. Comp. 1901, p. 505; Wiley

v. Sinkler, 179 U. S. 58 (45:84); Swofford v. Templeton, 185 U. S. 487-494 (46:1005).

⁵⁸ U. S. Rev. Stat. sec. 1979.

⁵⁹ U. S. Rev. Stat. sec. 629, cl. 16; 18 U. S. Stat. at L. ch. 114, sec. 3, p. 335; 4 Fed. Stat. Anno. 249, 250; 1 Fed. Stat. Anno. 805, 806, 807; U. S. Stat. Comp. 1901, pp. 506, 507.

⁶⁰ Holt v. Indiana Mfg. Co., 176 U. S. 68, 73 (44:374); 28 U. S. Stat. at L. ch. 25, pp. 36, 37; U. S. Comp. Stat. 1901, pp. 1271-1273;

§ 765. **Suits for injuries resulting from conspiracies in violation of the "Civil Rights" Act.**—The circuit courts have jurisdiction, concurrent with the district courts, and exclusive of the state courts, of all suits authorized by law to be brought by any person on account of any injury to his person or property, or of the deprivation of any right or privilege of any citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section nineteen hundred and eighty of the United States Revised Statutes, Title, "Civil Rights."⁶¹

§ 766. **Same—Suits against persons having knowledge of such conspiracies.**—The circuit courts have jurisdiction of all suits authorized by law to be brought against any person who, having knowledge that any of the wrongs mentioned in section nineteen hundred and eighty of the Revised Statutes of the United States, are about to be done, and, having power to prevent or aid in preventing the same, neglects or refuses so to do, to recover damages for any such wrongful act.⁶²

§ 767. **Suits by and against trustees in bankruptcy.**—The circuit courts have jurisdiction of suits at law and in equity between trustees in bankruptcy as such and adverse claimants to the bankrupt's estate in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such suits had been between the bankrupt himself and the adverse claimants;⁶³ and suits by the trustee shall be brought and prosecuted only in those courts in which the bankrupt might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant, except suits for the recovery of property under section sixty, subdivision b., and section sixty-seven, subdivision c., of the bankruptcy act as amended.⁶⁴

30 U. S. Stat. at L. ch. 389, p. 432; U. S. Stat. Comp. 1901, pp. 459, 1202.

⁶¹ U. S. Rev. Stat. 629, cl. 17; ib., sec. 1980; 18 U. S. Stat. at L. ch. 114, sec. 3, p. 335; 4 Fed. Stat. Anno. 250; U. S. Stat. Comp. 1901, p. 507.

⁶² U. S. Rev. Stat. sec. 629, cl. 18; ib., sec. 1980; 4 Fed. Stat.

Anno. 250; U. S. Stat. Comp. 1901, p. 507.

⁶³ U. S. Rev. Stat. sec. 630; 30 U. S. Stat. at L. ch. 541, sec. 23, p. 552; 1 Fed. Stat. Anno. 590-593; Goodler v. Barnes, 94 Fed. R. 798.

⁶⁴ 30 U. S. Stat. at L. ch. 541, sec. 23, p. 552, amended 32 U. S. Stat. at L. ch. 487, sec. 8, pp. 498-499.

§ 768. **Proceedings by the federal government to condemn private property for public use.**—The circuit courts are, by federal statute, given jurisdiction, concurrent with the district courts, of all proceedings within their respective districts, for the condemnation of private property, needed by the government for any public use authorized by the constitution and valid laws of the United States.⁶⁵

§ 769. **Suits against the government under "The Tucker Act."**—The circuit courts are, by the Tucker Act, given jurisdiction of suits against the government of the United States, concurrent with the court of claims, to hear and determine all claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity or admiralty, if the United States were suable, and of all set-offs, counter-claims, claims for damages, liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claim against the government in said courts, where the amount of such claim exceeds \$1,000 and does not exceed \$10,000: Provided, said courts shall not have jurisdiction to hear and determine war claims, or any other claims which were rejected or reported on adversely by any court, department or commission authorized to hear and determine the same prior to March 3, 1887. And by an amendment of the act, it is provided that no suit against the government of the United States, brought by any officer of the United States to recover fees for services alleged to have been performed for the United States, shall be allowed under the act unless an account of said fees shall have been rendered and finally acted upon according to the provisions of the act of July thirty-first, eighteen hundred and ninety-four (chapter one hundred and seventy-four, Twenty-eight statutes at Large, page one hundred

⁶⁵ U. S. Rev. Stat. secs. 4870–4882; 25 U. S. Stat. at L. ch. 194 p. 94, and ch. 728, p. 357; 26 U. S. Stat. at L. ch. 797, sec. 1, pp. 315 316, and ch. 837, sec. 2, p. 412; 4 Fed. Stat. Anno. 700 et seq.; U. S. Comp. Stat. 1901, pp. 2516, 2518, 3375, 3376, 3525.

and sixty-two), unless the proper accounting officer of the treasury fails to finally act thereon within six months after the account is received in said office; and that the jurisdiction conferred by the act upon the circuit and district courts shall not extend to cases brought to recover fees, salaries or compensation for official services of officers of the United States, or brought for such purpose by persons claiming as such officers or as assignees or legal representatives thereof. All suits under the act must be brought within six years after the accrual of the right of action.⁶⁶

§ 770. Actions of debt for penalties under laws prohibiting importation of foreigners under contract to labor.—The circuit courts have jurisdiction, concurrent with the district courts, of all actions of debt for the recovery of the penalties imposed for any violation of the laws of the United States prohibiting the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its territories and District of Columbia.⁶⁷

§ 771. Jurisdiction of suits under the act to prevent unlawful occupancy of the public lands.—The circuit courts have jurisdiction, concurrent with the district courts, of all civil suits in the name of the United States for the recovery of the posses-

⁶⁶ 24 U. S. Stat. at L. ch. 359, pp. 505-508; 28 U. S. Stat. at L. ch. 174, p. 162; 30 U. S. Stat. at L. ch. 503, pp. 494, 495, and ch. 546, sec. 2, pp. 649, 650; 2 Fed. Stat. Anno. 80-88; U. S. Comp. Stat. 1901, pp. 752-758; *United States v. Swift* (C. C. A.), 139 Fed. R. 225, 230; *United States v. Cornell Steamboat Co.* (C. C. A.), 137 Fed. R. 455, 460; *United States v. Morgan*, 99 Fed. R. 570, 39 C. C. A. 653; *United States v. Jones*, 131 U. S. 1-20 (33:90); *United States v. Drew*, 131 U. S. 21 (33:93); *Hill v. United States*, 149 U. S. 598 (37:864).

⁶⁷ 32 U. S. Stat. at L. part 1, ch. 1012, sec. 29, p. 1220; 26 U. S. Stat. at L. ch. 551, sec. 13, p. 1086; *United States v. Mexican Nat. Ry. Co.*, 40 Fed. R. 769; *United*

States v. Whitcomb Metallic Bedstead Co., 45 Fed. R. 89.

The legislation of congress in relation to the importation and migration of foreigners and aliens under contract to labor is found in the following statutes, namely: 23 U. S. Stat. at L. ch. 164, pp. 332, 333; 24 U. S. Stat. at L. ch. 220, pp. 414, 415; 25 U. S. Stat. at L. ch. 1210, sec. 1, pp. 566, 567; 26 U. S. Stat. at L. ch. 551, pp. 1080-1086; 27 U. S. Stat. at L. ch. 206, pp. 569-571; 32 U. S. Stat. at L. part 1, ch. 1012, secs. 1, 2, 3, 4, 5, 6, 7, 8, 9, 29, pp. 1213-1222; 3 Fed. Stat. Anno. 298-307; 4 Fed. Stat. Anno. 219; U. S. Comp. Stat. Supplement 1905, pp. 274-289; U. S. Comp. Stat. 1901, p. 456.

sion of their public lands held by persons and corporations in violation of the act to prevent unlawful occupancy of such lands.⁶⁸

§ 772. Suits for partition when United States are one of tenants.—The circuit courts have jurisdiction of all suits in equity brought by one tenant in common or joint tenant for partition of lands in cases where the United States are one of such tenants, such suit to be brought in the district where the land lies. In such cases, service is made upon the United States by causing a copy of the bill filed to be served upon the district attorney of the district wherein the suit is brought, and by mailing a copy of same by registered letter to the attorney-general of the United States, the complainant filing with the clerk of the court in which the bill is filed an affidavit of the service on the district attorney and mailing to the attorney-general.⁶⁹

§ 773. Seizure and destruction of obscene books, pictures and other articles imported from foreign countries in violation of law.—The circuit courts have jurisdiction, concurrent with the district courts, of proceedings for the seizure and destruction of any obscene book, pamphlet, paper, writing, advertisement, circular, print, picture, drawing or other representation, figure or image on or of paper or other material, or any cast, instrument, or other article of an immoral nature, or any drug or medicine, or any article whatever for the prevention of conception or for causing unlawful abortion, or any lottery ticket or any advertisement of any lottery, imported into this country from a foreign country, in violation of the federal statutes; and upon such seizure to condemn such articles and have them destroyed in execution of the court's judgment.⁷⁰

§ 774. Suits in equity and actions at law arising under the acts of congress "to protect trade and commerce against unlawful restraints and monopolies."—The circuit courts are vested with jurisdiction of suits in equity to prevent and restrain violations of the acts of congress to protect trade and commerce among the several states, and the import trade, against

⁶⁸ 23 U. S. Stat. at L. ch. 149, sec. 2, pp. 321, 322; *Canfield v. U. S.*, 167 U. S. 518, 528 (42:260); 6 Fed. Stat. Anno. 533-536.

⁶⁹ 30 U. S. Stat. at L. ch. 339, pp. 416, 417.

⁷⁰ 30 U. S. Stat. at L. ch. 11, secs. 16, 17, 18, pp. 208, 209; 3 Fed. Stat. Anno. 317, 318, 319.

unlawful restraints, agreements, trusts, monopolies and conspiracies;⁷¹ and of suits for treble damages and reasonable attorney's fees, brought by any person injured in his business or property against any other persons or corporation by reason of anything done by them and forbidden or declared unlawful by said acts, without respect to the amount in controversy.⁷²

§ 775. Same—Suits for injunction can be brought only by the United States.—Suits in equity to prevent and restrain violations of the acts mentioned in the section next preceding can be brought only by and in the name of the United States, under the direction of the attorney-general of the United States; and it is made the duty of the district attorneys of the United States, in their respective districts, to institute and prosecute such suits, upon receiving such directions.⁷³

§ 776. Same—The damages must be recovered by direct suit and not by set-off.—The recovery of treble damages and attorney's fees which this legislation authorizes by any person who shall be injured in his business or property by any other person or corporation by reason of anything thereby forbidden or declared unlawful, must be by a direct suit for that purpose, and cannot be recovered by way of set-off in an action brought upon a special contract for the price of goods sold by a corporation or company formed and doing business in violation of the act.⁷⁴

⁷¹ 26 U. S. Stat. at L. ch. 647, sec. 4, p. 209; 28 U. S. Stat. at L. ch. 349, sec. 74, p. 570; 7 Fed. Stat. Anno. 344, 346; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290-370 (41:1007); *United States v. Joint-Traffic Ass'n*, 171 U. S. 505-578 (43:259); *Northern Securities Co. v. U. S.*, 193 U. S. 197-406 (48:679); *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211-248 (44:136); *Swift & Co. v. U. S.*, 196 U. S. 375-402 (49:518).

⁷² 26 U. S. Stat. at L. ch. 647, sec. 7, p. 209; 28 U. S. Stat. at L. ch. 349, sec. 77, p. 570; 7 Fed. Stat. Anno. 345, 347; *Montague & Co. v. Lowry*, 193 U. S. 38-48

(48:608); *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540-571 (46:679); *Atlanta v. Chattanooga Foundry & C. Co.*, 127 Fed. R. 23; *Metcalf v. American School Furniture Co.*, 108 Fed. R. 909; *Southern Indiana Express Co. v. U. S. Express Co.*, 88 Fed. R. 659; *Central Coal Co. v. Hartman*, 111 Fed. R. 96.

⁷³ 26 U. S. Stat. at L. ch. 647, sec. 4, p. 209; *Minnesota v. Northern Securities Co.*, 194 U. S. 48-73 (48:870).

⁷⁴ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540-571 (46:679); 26 U. S. Stat. at L. ch. 647, sec. 7, p. 209.

§ 777. **Same—Applies to common carriers by railway—Suits to annul illegal traffic agreements.**—The act to protect trade and commerce against unlawful restraints and monopolies applies to and embraces common carriers by railway, and renders illegal all agreements between competing railroads relating to traffic rates for the transportation of articles of commerce between states, the direct, immediate and necessary effect of which is to put a restraint upon trade or commerce; and the circuit courts of the United States have jurisdiction of a bill in equity to obtain a decree declaring null and void such agreements and restraining the parties from acting under them, and from further agreeing, combining, and conspiring and acting together to maintain rates for carrying freight upon their lines of railroad in restraint of foreign and interstate commerce.⁷⁵

§ 778. **Same—Same—Consolidation of capital stock of competing lines in holding company for purpose of joint control—Suit to enjoin.**—A combination for the formation, by the owners of a controlling interest of the capital stock of two railway companies, owning and operating two independent, parallel and competing railway lines engaged in active competitive interstate and foreign commerce, of a holding corporation, and the consolidation in its hands of a controlling interest in the capital stock of each of the constituent companies, with power in the holding corporation to vote such stock and in all respects to act as the owner thereof, and to do whatever it might deem necessary in aid of such railway companies or to enhance the value of their stocks, with the ultimate view and purpose of placing both the railway companies and their railway and transportation lines under one common management and control, is a combination or conspiracy in restraint of trade or commerce among the several states and with foreign nations, within the meaning of the act to protect trade and commerce against unlawful restraints and combinations; and the circuit courts have jurisdiction of a bill in equity filed by the United States against such holding corporation to enjoin it from voting the stock of the railway companies, and from attempting to vote it, and from exercising or attempting to exercise any control, direction, su-

⁷⁵ United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290-374 (41:1007); United States v. Joint-Traffic Ass'n, 171 U. S. 505-578 (43:259).

pervision or influence whatsoever over the business and corporate acts of the railway companies or either of them, by virtue of its holding an interest in their capital stock, and to enjoin the constituent companies respectively from permitting the holding corporation to control their affairs, and from paying dividends to the holding corporation on account of any of their capital stock held by it.⁷⁶

§ 779. Same—Combinations in restraint of trade among states in articles of commerce—Injunction.—Combinations among independent dealers, whether private persons or private corporations, in restraint of trade among the states, in articles of commerce, and combinations in aid of an attempt to monopolize commerce among the states in any article of commerce, are in violation of the act to protect commerce against unlawful restraints and monopolies; and the circuit courts have jurisdiction of bills in equity to restrain such combinations. The true test of the illegality of such combinations is, do they necessarily and directly produce a restraint upon interstate commerce.⁷⁷

§ 780. Suits under the act to regulate commerce.—The circuit courts are vested with jurisdiction, concurrent with the district courts, of all actions at law for the recovery of damages sustained by any person by reason of any act of a common carrier in violation of the act to regulate commerce,⁷⁸ and also of all applications for writs of mandamus under said act by shippers to compel common carriers to extend to them equal facilities with those given to other shippers for like traffic under similar conditions.⁷⁹ And they also have jurisdiction to enforce all orders and compel compliance with all regulations made by the interstate commerce commission under and by virtue of the authority of the act to regulate commerce, and amendments thereto by any common carrier, and to that end to issue writs of mandamus, and writs of injunction, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from

⁷⁶ *Northern Securities Co. v. U. S.*, 193 U. S. 197-406 (48:679). sec. 9, p. 382; 3 Fed. Stat. Anno. 833; U. S. Comp. Stat. 1901, p. 3154.

⁷⁷ *Addyston Pipe & Steel Co. v. U. S.*, 175 U. S. 211-248 (44:136); *Montague Co. v. Lowry*, 193 U. S. 38-48 (48:608); *Swift & Co. v. U. S.*, 196 U. S. 375-402 (49:518). ⁷⁹ 25 U. S. Stat. at L. ch. 382, sec. 10, p. 855; 3 Fed. Stat. Anno. pp. 852, 853; 3 U. S. Comp. Stat. 1901, p. 3172.

⁷⁸ 24 U. S. Stat. at L. ch. 104,

further disobedience of such order, or to enjoin upon it, or them, obedience to the same, and in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus; and jurisdiction of suits to recover of any carrier any sum of money which it has been ordered to pay by the commission, and which it has failed to pay; and they also have jurisdiction of suits in equity against the commission to enjoin, set aside, annul, or suspend any order or requirement of the commission.⁸⁰

⁸⁰ 34 U. S. Stat. at L. ch. 3591, sec. 5, p. 590 (amending sec. 16 of the act to regulate commerce) and sec. 7, p. 593 (amending sec. 20 of the act to regulate commerce).

Note. History of the act to regulate Commerce. The legislation upon this subject is contained in the following statutes, namely: 24 U. S. Stat. at L. ch. 104, pp. 379-387, approved Feb. 4, 1887; 25 U. S. Stat. at L. ch. 382, pp. 855-863, approved March 2, 1889; 26 U. S. Stat. at L. ch. 128, pp. 743, 744, approved Feb. 10, 1891; 27 U. S. Stat. at L. ch. 83, pp. 443, 444, approved Feb. 11, 1893; 28 U. S. Stat. at L. ch. 61, pp. 643, 644, approved Feb. 8, 1895; 32 U. S. Stat. at L. ch. 544, p. 823, approved Feb. 11, 1903; 32 U. S. Stat. at L. ch. 708, pp. 847-849, approved Feb. 19, 1903; 34 U. S. Stat. at L. ch. 3591, pp. 584-595, approved June 29, 1906.

Sections 2, 3, 4, 5, 7, 8, 9, 11, 13 and 19 of the original act have never been amended; but secs. 6, 10, 12, 14, 16, 17, 18, 20, 21 and 22 of that act have been amended by complete substitution by the acts of March 2, 1889, Feb. 10, 1891, Feb. 8, 1895, and June 29, 1906, and sec. 16a was added, and a new provision added to sec. 22, and by the last, sec. 24 was added to the act.

The Act of Feb. 19, 1903, 32 U. S. Stat. at L. ch. 708, sec. 1, pp. 847-849, known as the "Elkins Act," contains the following provision:

"In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as a part of the penalty being hereby abolished." But the sixth section of the act, as amended by the Act of June 29, 1906, restores imprisonment as a part of the penalty for a violation of the act, in the following provision, namely:

"*Provided*, that any person, or any officer or director of any corporation, subject to the provisions of this act, or to the act to regulate commerce and the acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term not exceeding two years, or

§ 781. Same—Rate-making power vested in the commission—Suits to enjoin orders of commission.—The recent act to amend the act to regulate commerce, and to enlarge the powers of the interstate commerce commission, provides that: "All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such services or any part thereof is prohibited and declared to be unlawful."⁸¹ And the commission is authorized and empowered, and it is made its duty, whenever, after a full hearing upon a complaint made as provided in the act, or upon complaint of any common carrier, it shall be of opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of the act, for the transportation of persons or property as therein defined, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of the act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such cases as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. And it is provided that any carrier or carriers against whom any order or requirement of the commission shall be made may file a bill in equity to enjoin, set aside, annul or suspend any such order, and jurisdiction of such bill or suit is vested in the circuit court of the district in which the plaintiff carrier has its principal office, and if the order be made against more than one carrier, then in the district where either one of

both such fine and imprisonment,
in the discretion of the court."

sec. 4, p. 589 (amending sec. 15
of the act to regulate commerce).

⁸¹ 34 U. S. Stat. at L. ch. 3591,

them has its principal operating office; and it is further provided that no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the commission shall be granted except on hearing after not less than five days' notice to the commission, and an appeal is allowed by the statute to the supreme court, from any interlocutory order or decree granting or continuing an injunction in any such suit, but the appeal must be taken within thirty days from the entry of the order or decree, and shall take precedence in the appellate court over all other causes, except causes of a like character and criminal causes.⁸²

§ 782. Jurisdiction to naturalize aliens as citizens of the United States.—The circuit courts are vested with jurisdiction, concurrent with the district courts, and courts of record of the several states, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited, to naturalize aliens as citizens of the United States, under and by virtue of and in accordance with the provisions of the “act to establish a bureau of immigration and naturalization, and to provide for a uniform rule of naturalization throughout the United States.”⁸³ The naturalization jurisdiction of the courts, state and federal, extends only to aliens resident within their judicial districts, respectively.⁸³

§ 783. No jurisdiction in original mandamus proceedings.—The circuit courts of the United States have no jurisdiction under the general federal judiciary act of original proceedings seeking relief by mandamus, and can issue the writ only in cases already pending and in aid of their jurisdiction previously acquired by other means and other process. This was the rule under the original judiciary act, and has so continued under the subsequent acts, including the one now in force.⁸⁴

⁸² 34 U. S. Stat. at L. ch. 3591, sec. 5, p. 592 (amending sec. 16 of the act to regulate commerce).

⁸³ 34 U. S. Stat. at L. ch. 3592, pp. 596–607, approved June 29, 1906.

⁸⁴ United States ex rel. Knapp v. Lake Shore & M. S. Ry. Co.

et al., 197 U. S. 536–543 (49:870); Covington & Cincinnati Bridge Co. v. Hager, 203 U. S. 109–111 (51:111); Rosenbaum v. Bauer, 120 U. S. 450–464 (30:743); Smith v. Bourbon County, 127 U. S. 105–113 (32:73).

CHAPTER XVI.

THE REMOVAL OF CAUSES.

- § 784. The removal of causes controlled by judiciary act of March 3, 1887, as corrected by act of August 13, 1888—Two exceptions.
785. Removal only a method by which federal courts acquire original jurisdiction of causes.
786. Same—State courts not bound to surrender jurisdiction if record fails to show removable suit.
787. Same—Federal court may protect its jurisdiction by injunction.
788. Right of removal limited to suits which could have been originally brought in federal court.
789. Same — Classification of suits which may be removed from state courts into federal circuit courts.
790. Same—Same—All suits of a civil nature at common law or in equity.
791. Same— Same— Same— Illustration — Condemnation proceeding.
792. Same—The two classes of cases removable under special statutes.
793. To what circuit court the removal of the cause is to be made.
794. Defendants only can remove a cause.
- § 795. Same—None but non-resident defendants can remove—One exception.
796. All defendants required to join in application for removal—Exceptions.
797. Removal of suits arising under the constitution or laws or treaties of the United States.
798. Same—Nature of case must appear from plaintiff's statement of his own claim, or it cannot be removed.
799. Same— Same— When defendant is a federal corporation.
800. Same—Same—Suit against receiver appointed by federal court not removable.
801. Same—All defendants must join in the application for removal.
802. Removal of suits between citizens of different states.
803. Same—Statutory provision.
804. Same—When diversity of citizenship must exist.
805. Removal of suits between citizens and aliens.
806. Removal on ground of "separable controversy."
807. Same—"Separable Controversy" defined.
808. Same — Same — Action of tort against several defendants.

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| <p>§ 809. Same — Same — Same —
Right of state to regulate action for negligence.</p> <p>810. Same — Removal on this ground carries entire suit.</p> <p>811. Removal on the ground of prejudice or local influence.</p> <p>812. Same—No removal unless suit could originally have been brought in the circuit court.</p> <p>813. Same—None but defendants can remove.</p> <p>814. Same — Removal not allowed as between defendants.</p> <p>815. Same—Application must be made to federal circuit court—When made.</p> <p>816. Same — Statutory jurisdictional amount must be involved.</p> <p>817. Procedure to remove causes —Petition and bond — When to be filed.</p> <p>818. Same—Application must be made when plea is due.</p> <p>819. Same — Same — When suit becomes a removable one after plea is due.</p> | <p>§ 820. Same—What petition for removal should state.</p> <p>821. Same—Issues of fact must be tried in the circuit court.</p> <p>822. Same—What citizens of same state claim land under grants of different states.</p> <p>823. Procedure for the removal of causes on the ground of prejudice or local influence.</p> <p>824. Same—Judicial inquiry into the facts.</p> <p>825. Remanding causes to the state courts.</p> <p>826. Same—Effect of this legislation.</p> <p>827. Same—Remanded because not removed within time allowed by law.</p> <p>828. Removal of suits against persons denied civil rights.</p> <p>829. Removal of suits against revenue officers.</p> <p>830. Same — Prosecutions of crimes against the states belong to their courts—Exceptions.</p> |
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§ 784. The removal of causes controlled by judiciary act of March 3, 1887, as corrected by act of August 13, 1888—Two exceptions.—There existed at one time considerable doubt and confusion as to what extent the last legislation of congress on the subject of the removal of causes from state courts into the circuit courts had repealed former legislation on the same subject; but now it is definitely settled that, both the right of removal, and the procedure by which it is effected, are (with the exception of two special classes of cases, which are specially provided for by special statutes), controlled exclusively by the federal judiciary act of March 3, 1887, as corrected by the act

of August 13, 1888;¹ the repealing clause of that act has repealed and superseded all earlier laws upon the subject of removal, and provided an entirely new scheme of removal,² with the exception of the special statutes above mentioned,³ and which were expressly continued in force by the last judiciary act.⁴

§ 785. Removal only a method by which federal circuit court acquires original jurisdiction of causes.—There are two methods by which the federal circuit courts acquire original jurisdiction of causes, namely: (1) By filing the suits in those courts in the first instance, and (2) by the removal into them from the state courts of suits over which the state and federal courts have concurrent jurisdiction. It is a general rule of law that when two courts have concurrent jurisdiction of a cause, that court which first acquires the actual jurisdiction over it is entitled to retain it until its jurisdiction is exhausted by hearing, judgment and execution; but, under our dual system of government, a fundamental principle of which is that the constitution, laws and treaties of the United States are the supreme law of the land, when congress enacts a law for the removal into the federal courts from the state courts of suits over which the two judicial systems have concurrent jurisdiction, that law becomes operative in all the states as the supreme law of the land, and when a party complies with its provisions in a case brought in a state court, if the case be a removable one, that is, if the suit, in its nature, be one of which the federal circuit court could rightfully take jurisdiction, and removable under the statute, then upon the filing of a petition for removal, in due time, with a sufficient bond, the case is, in law, removed, and the state court in which it is pending will lose jurisdiction to proceed further, and all subsequent proceedings in that court will be void,⁵ and the court into which the cause is removed may pro-

¹ 25 U. S. Stat. at L. ch. 866, secs. 1 and 2, p. 433.

² *Hanrick v. Hanrick*, 153 U. S. 192-198 (38:685); *O'Connor v. Texas*, 202 U. S. 501-510 (50:1120); *Cochran v. Montgomery County*, 199 U. S. 260-274 (50:182); *Fisk v. Henarie*, 142 U. S. 459-471 (35:1080).

³ U. S. Rev. Stat. secs. 641, 642,

643, 4 Fed. Stat. Anno. 258-261; U. S. Comp. Stat. 1901, pp. 520, 521.

⁴ 25 U. S. Stat. at L. ch. 866, sec. 5, p. 433.

⁵ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239-261 (49:462); *New Orleans M. & F. R. Co. v. Mississippi*, 102 U. S. 135, 141 (26:96); *Baltimore &*

tect its jurisdiction by enjoining the plaintiff from proceeding in it in the state court.⁶

§ 786. **Same—State court not bound to surrender jurisdiction if record fails to show removable suit.**—It is well settled that, when an application is made to a state court for the removal of a cause to a federal circuit court, if, upon the face of the record, including the petition for a removal, the suit does not appear to be a removable one, the state court is not bound to surrender its jurisdiction, and may proceed as if no application for removal had been made; all issues of fact raised and presented upon a petition for removal must be tried by the circuit court, but the state court may, however, determine for itself whether or not upon the face of the record the cause is a removable one, and if it decides against the removal its judgment is reviewable on error by the supreme court of the United States. If the state court proceeds after a petition and bond for removal are filed, it does so at the risk of having its final judgment reversed if the record shows on its face that when the petition was filed that court ought to have surrendered jurisdiction.⁷

§ 787. **Same—Federal court may protect its jurisdiction by injunction.**—After the presentation to the state court of a sufficient petition and bond for removal of a cause which is a removable one, it is competent for the circuit court, upon the filing of an ancillary bill, for the purpose, by the removing party, to restrain, by writ of injunction, the party against whom the cause has been legally removed, from taking further steps in the state courts; and such injunction is not a violation of section seven hundred and twenty of the Revised Statutes which declares that “the writ of injunction shall not be granted by any court of the United States to stay proceedings in any

Ohio R. Co. v. Koontz, 104 U. S. 5, 14 (26:643); National S. S. Co. v. Tugman, 106 U. S. 118 (27:87); St. Paul & C. R. v. MacLean, 108 U. S. 212 (27:703); Crehore v. Ohio & M. R. Co., 131 U. S. 240 (33:144); Kern v. Hendekoper, 103 U. S. 485 (26:354); Marshall v. Holmes, 141 U. S. 589 (35:870).

⁶ Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239-261 (49:462); French v. Hay,

22 Wall. 252 (22:857); Dietzsch v. Hendekoper, 103 U. S. 494 (26:497); Moran v. Sturgess, 154 U. S. 256 (38:987).

⁷ Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239-261 (49:462); Stone v. South Carolina, 117 U. S. 430 (29:962); Carson v. Hyatt, 118 U. S. 279 (30:167); Burlington C. R. & N. R. Co. v. Dunn, 122 U. S. 513 (30:1159).

court of a state, except in cases where such injunction may be authorized by law relating to proceedings in bankruptcy.”⁸

§ 788. Right of removal limited to suit which could have been originally brought in the federal court.—The rule is now well settled that, under the federal judiciary act of March 3, 1887, as corrected by the act of August 13, 1888, a suit cannot be removed from a state court into a federal circuit court, unless it could have been originally brought by the plaintiff in the circuit court. The jurisdiction of the circuit courts on removal, by the defendant, under the second section of the judiciary act, is limited to such suits as might have been brought in that court by the plaintiff under the first section of the act. The first section defines the original jurisdiction of the circuit defendants from a state court; and the right of removal always court, and the second section declares: “That any suit of a civil nature, at law or in equity arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district by the defendant or defendants therein, being non-residents.” This section refers to the first part of the first section which confers jurisdiction on the circuit courts, and not to the last clause of that section which relates to the district in which suit may be brought. Unless the suit could have been brought in the first instance by the plaintiff in the circuit court, it cannot be removed there by the defendant or presents a question of substantive jurisdiction, which must be determined by the first section which confers and defines the jurisdiction of the circuit courts.⁹

⁸ *Madisonville Traction Co. v. Hendekoper*, 103 U. S. 494 (26: 497); *Moran v. Sturgess*, 154 U. S. 239-261 (49:462); *French v. Hay*, 256 (38:981).
⁹ 24 U. S. Stat. at L. ch. 373, 22 Wall. 262 (22:857); *Dietzsch v.*

§ 789. **Same—Classification of suits which may be removed from state courts into federal circuit courts.**—There are five classes of cases of which the circuit courts are given original jurisdiction concurrent with the courts of the several states by the first section of the judiciary act, and which, by the second section of the act, may be removed from the state courts into the federal circuit courts, namely: (1) Suits of a civil nature, at common law or in equity, arising under the constitution or laws or treaties of the United States, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, without regard to the citizenship of the parties; (2) suits of a civil nature, at common law or in equity, in which the United States are plaintiffs or petitioners, without regard to the sum or value of the matter in dispute; (3) suits of a civil nature at common law or in equity, in which there is a controversy between citizens of different states, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; (4) suits of a civil nature, at common law or in equity, between citizens of the same state, claiming lands under grants of different states without regard to the sum or value of the matter in dispute; and (5) suits of a civil nature, at common law or in equity, in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.¹⁰

It is definitely settled, by the repeated decisions of the supreme court of the United States that, unless a suit falls within one of the above designated classes, it cannot, under the present judiciary act, be removed from a state court into a federal circuit court;¹¹ but, as indicated in a previous section, there are

secs. 1 and 2, p. 552; 25 U. S. Stat. at L. ch. 866, secs. 1 and 2, p. 433; *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239-261 (49:462); *Tennessee v. Union & Planters Bank*, 152 U. S. 454-461 (38:511); *Mexican National R. Co. v. Davidson*, 157 U. S. 201-209 (39:672); *Cochran v. Montgomery County*, 199 U. S. 260-272 (50:188); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S.

185-191 (46:144); *Ex parte Wisner*, 203 U. S. 449-461 (51:264); *Minnesota v. Northern Securities Co.*, 194 U. S. 48-73 (48:870).

¹⁰ 24 U. S. Stat. at L. ch. 373, secs. 1, 2 and 3, p. 552; 25 U. S. Stat. at L. ch. 866, secs. 1 and 2, p. 433.

¹¹ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239-261 (49:462); *Tennessee v. Union & Planters Bank*, 152 U. S.

two other classes of cases, specially provided for by special statutes, which may be removed under those statutes.¹²

§ 790. Same—Same—All suits of a civil nature at common law or in equity.—All suits of a civil nature, at common law or in equity, if they fall within any one of the five classes enumerated in the section next preceding, are within the jurisdiction of the federal circuit courts under the first section, and are removable under the second section of the judiciary act; the character of the suit is wholly immaterial, provided it be a suit of a civil nature, at common law or in equity, within the meaning of the second section of the third article of the federal constitution, as it has been interpreted by the supreme court; if such be the nature of the suit, it is removable.¹³

§ 791. Same—Same — Same — Illustration — Condemnation proceeding.—A judicial proceeding, in the exercise of the right of eminent domain, for the condemnation of private property for public use, is a suit of a civil nature, at common law, and is removable, if the requisites of jurisdiction exist, as those requisites are defined in the first section of the judiciary act;¹⁴ and the owner of the property is, for the purposes of removal, the defendant in the suit.¹⁵

§ 792. Same—The two classes of cases removable under special statutes.—The two classes of cases removable from the state courts to the federal circuit courts under and by virtue of special statutes, are the following, namely:

(1) Civil suits and criminal prosecutions commenced in any

201-209 (39:672); *Cochran v. Montgomery County*, 199 U. S. 260-272 (50:182); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185-191 (46:144); *Minnesota v. Northern Securities Co.*, 194 U. S. 48-73 (48:870); *Ex parte Wisner* 203 U. S. 449-461 (51:264).

¹² U. S. Rev. Stat. secs. 641, 642, 643; 4 Fed. Stat. Anno. 258-261; U. S. Comp. Stat. 1901, pp. 520, 521; 25 U. S. Stat. at L. ch. 866, sec. 5, p. 433.

¹³ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239-261 (49:462); *Gaines v. Fuentes*, 92 U. S. 20 (23:524).

¹⁴ *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239-261 (49:462); *Kohl v. United States*, 91 U. S. 367-376 (23:449); *Mississippi & R. River Boom Co. v. Patterson*, 98 U. S. 403 (25:206); *Searle v. School Dist. No. 2*, 124 U. S. 197 (31:415); *Colorado Midland R. Co. v. Jones*, 29 Fed. R. 193; *Mineral Range R. Co. v. Detroit & L. S. Cooper Co.*, 25 Fed. R. 515.

¹⁵ *Mason City & Fort Dodge R. Co. v. Boynton*, 204 U. S. 570-580 (51:620).

state court against any person who is in such court denied equal civil rights;¹⁶ and (2) civil suits and criminal prosecutions commenced in any state court, against revenue officers acting under the laws of the United States, or against persons holding property by title derived from any such officer.¹⁷ These two classes of cases are not covered by the judiciary act of March 3, 1887, as corrected by the act of August 13, 1888; but, on the other hand, the fifth section of that act expressly continues in force the previously existing special legislation providing for the removal of those classes of cases, the said fifth section so far as pertinent to this subject, being as follows: "That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in section six hundred and forty-one, or six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States."¹⁸

§ 793. To what circuit court the removal of the cause is to be made.—The second section of the judiciary act, defining the right of removal, declares that the removal may be made "to the circuit court of the United States for the proper district;" and the third section of the act, prescribing the procedure for the removal of causes, declares that the party entitled to remove "may make and file a petition in such suit in such state court * * * for the removal of such suit into the circuit court to be held in the district where such suit is pending." These provisions of the statute leave no doubt as to what court the removal is to be made; it must be to the federal circuit court of the federal district within whose territorial limits is situated the state court in which the suit to be removed is pending.¹⁹ Where a suit is brought in a state court, and neither the plaintiff nor defendant resides in that state, but are citizens of different states, the suit cannot be removed into a federal circuit court upon the ground of diversity of citizenship, by the defendant, if the plaintiff resists the removal, because the suit is not brought in the district of the residence of either the plaintiff or defendant, and could not have been brought in the

¹⁶ U. S. Rev. Stat. secs. 641, 642.

¹⁷ U. S. Rev. Stat. 643.

¹⁸ 25 U. S. Stat. at L. ch. 866, sec. 5, p. 433.

¹⁹ 25 U. S. Stat. at L. ch. 866, secs. 2 and 3, p. 433.

federal circuit court of that district by the plaintiff, and the defendant, by filing his petition for removal invokes the jurisdiction of and seeks relief from the circuit court in another district than his own.²⁰

§ 794. Defendants only can remove a cause.—The policy of the present judiciary act is to contract the jurisdiction of the federal circuit courts, both as to suits instituted in them in the first instance, and as to suits removed into them from the state courts; and, pursuant to that policy, the act allows to no one but a defendant the right to remove any cause, whatever, from a state court into a federal circuit court. This construction of the statute is definitely settled by the repeated decisions of the supreme court.²¹

§ 795. Same—None but non-resident defendants can remove—One exception.—With the exception of suits arising under the constitution or laws or treaties of the United States, the removal of which is provided for in the first clause of the second section of the judiciary act, none but non-resident defendants have the right of removal. The second clause of the second section is as follows:

“Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district, by the defendant or defendants therein, being non-residents of that state.” It is the defendant or defendants who are non-residents of the state in which the action is pending, who may remove the same into the circuit court of the United States for the proper district, in all cases with the one exception above mentioned, and to be a non-resident within the meaning of the act such defendant must be a citizen or corporation of another state.²²

²⁰ *Ex parte Wisner*, 203 U. S. 449-461 (51:264).

²¹ 25 U. S. Stat. at L. ch. 866, secs. 2 and 3, p. 433; *Hanrick v. Hanrick*, 153 U. S. 192-198 (38:685); *Tennessee v. Union & Planters Bank*, 152 U. S. 454-472 (38:511).

²² 25 U. S. Stat. at L. ch. 866, sec. 2, p. 433; *Martin v. Snyder*, 148 U. S. 663-664 (37:602); *Gerling v. Baltimore & Ohio R. Co.*, 151 U. S. 673-710 (38:311); *Cochran v. Montgomery County*, 199 U. S. 260-274 (50:182).

§ 796. All defendants required to join in application for removal—Exceptions.—Except in cases of a separable controversy, and cases of prejudice or local influence, all defendants are required to join in the application for removal of a cause from a state court to a circuit court of the United States.²³

§ 797. Removal of suits arising under the constitution or laws or treaties of the United States.—The first clause of the second section of the judiciary act is: “That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein, to the circuit court of the United States for the proper district;”²⁴ and, inasmuch as the first section of the act requires that, in order to give the circuit court jurisdiction in such cases, the matter in dispute must exceed, exclusive of interest and costs, the sum or value of two thousand dollars,²⁵ the jurisdictional amount must exist, in order to give the right of removal.²⁶

§ 798. Same—Nature of case must appear from plaintiff’s statement of his own claim, or it cannot be removed.—It is well settled, by a long line of decisions of the supreme court, that a case cannot be removed from a state court into a circuit court of the United States on the sole ground that it is one arising under the constitution or a law or a treaty of the United

²³ *Cochran v. Montgomery County*, 199 U. S. 260–274 (50:182); *Gableman v. Peoria D. & E. R. Co.*, 179 U. S. 335–342 (45:220); *Chicago R. I. & P. I. Co. v. Martin*, 178 U. S. 245–251 (44:1055); 25 U. S. Stat at L. ch. 866, sec. 2, p. 433.

²⁴ 25 U. S. Stat. at L. ch. 866, sec. 2, p. 433.

²⁵ *United States v. Sayward*, 160 U. S. 493–498 (40:508); *Fishback v. Western Union Telegraph Co.*,

161 U. S. 96–101 (40:630); 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433.

²⁶ *Mexican National R. Co. v. Davidson*, 157 U. S. 201–209 (39:672); *Tennessee v. Union & Planters Bank*, 152 U. S. 454–461 (38:511); *Cochran v. Montgomery County*, 199 U. S. 260 (50:182); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185–191 (46:144); *Madisonville Traction Co. v. St. Bernard Min. Co.*, 196 U. S. 239–261 (49:462); *Minnesota v. Northern Securities Co.*, 194 U. S. 48 (48:870).

States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want of it cannot be supplied by any statement in the petition for removal, or in the subsequent pleadings.²⁷

§ 799. Same—Same—When defendant is a federal corporation.—The rule stated in the section next preceding is qualified and limited to the extent, that the right of a defendant to remove a case from a state court into a federal circuit court upon the ground that it is a federal corporation cannot be cut off or taken away by the plaintiff's averments or lack of averments as to its character, and the source of its powers, faculties and capacities; and, in such case, the jurisdictional facts may be averred in the petition for removal, and that will be sufficient to give the federal circuit court jurisdiction of the case upon removal.²⁸

§ 800. Same—Same—Suit against receiver appointed by federal court not removable.—A suit against a receiver of a railroad, appointed by a federal circuit court, under its general equity powers, and not under any provision of the constitution or laws of the United States, and whose liability depends upon the general rules and principles of law, and whose defense in the suit does not rest upon any act of congress, is not removable from a state court into a federal circuit court, as one arising under the constitution or a law of the United States.²⁹

§ 801. Same—All defendants must join in the application for removal.—When it is sought to remove a suit from a state court into a federal circuit court, upon the ground that it is one arising under the constitution or a law or a treaty of the United States, and there are more than one defendant, all the defendants must join in the application for removal. It appears

²⁷ *Minnesota v. Northern Securities Co.*, 194 U. S. 48-73 (48:870); *Arkansas v. Kansas & T. Coal Co.*, 183 U. S. 185-191 (46:144); *Tennessee v. Union & Planters Bank*, 154-461 (38:511); *Chappell v. Waterworth*, 155 U. S. 102 (39:85); *Walker v. Collins*, 167 U. S. 57 (42:76); *Gableman v. Peoria & Evansville Ry. Co.*, 179 U. S. 335-344 (45:220); *Mountain View Mining & Milling Co. v. McFadden*,

180 U. S. 533-536 (45:656); *Postal Telegraph Cable Co. v. Ala.*, 155 U. S. 482-488 (39:231).

²⁸ *Texas & Pacific Ry. Co. v. Cody*, 166 U. S. 606-616 (41:1132); *Texas & Pacific Ry. Co. v. Barrett*, 166 U. S. 617-620 (41:1136).

²⁹ *Gableman v. Peoria, Decatur & Evans. Ry. Co.*, 179 U. S. 335-342 (45:220); *Chicago Rock Island & Pacific Ry. Co. v. Martin*, 178 U. S. 245-251 (44:1055).

upon the face of the statute that if a suit arises under the constitution or a law or a treaty of the United States, the defendant, if there be but one, or the defendants, if there be more than one, may remove the suit; and it is settled that the defendants, if there be more than one, must all join in the application.³⁰

§ 802. Removal of suits between citizens of different states.

Any suit of a civil nature, at common law or in equity, in which there is or shall be a controversy between citizens of different states, and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, which may be brought in any state court, may be removed into the federal circuit court to be held in the district where such suit is pending, by the defendant or defendants therein, being non-residents of that state; none but non-resident defendants can remove such suit, and, if there be more than one defendant, all of them must join in the application for removal.³¹

§ 803. Same—Statutory provisions.—The first section of the judiciary act vests the federal circuit court with jurisdiction, concurrent with the courts of the several states, of all suits at law or in equity, in which there shall be a controversy between citizens of different states, where the jurisdictional amount is in dispute; and the second section of the act, after providing, in the first clause thereof, for the removal of suits arising under the constitution or laws or treaties of the United States, in the second clause confers upon non-resident defendants the right to remove any other suit, than those mentioned in the first paragraph, “of which the circuit courts of the United States are given jurisdiction by the preceding section,” that is by the first section of the act; and thus it appears on the face of the statute itself, that (1) suits between citizens of different states in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, are removable under the act, (2) that the act allows to none but defendants the right of removal, (3) that the right of removal in such cases

³⁰ *Chicago, Rock Island & Pacific Ry. Co. v. Martin*, 178 U. S. 245-251 (44:1055); *Gableman v. Peoria, Decatur & Evansville Ry. Co.*, 179 U. S. 335-342 (45:220); 25 U. S. Stat. at L. ch. 866, sec. 2, p. 433.

³¹ 25 U. S. Stat. at L. ch. 866, secs. 1, 2 and 3, p. 433; *Chicago Rock Island & Pacific Ry. Co. v. Martin*, 178 U. S. 245-251 (44:1055).

is not given to all defendants but only to defendants who are non-residents of the state in which the suit is pending; and (4) if there be more than one defendant they must all be competent to remove—that is must all be non-residents—and must all join in the application for removal.³²

§ 804. Same—When diversity of citizenship must exist.—In order to give the right of removal on the ground of diversity of citizenship, it must affirmatively appear in the petition for removal, or elsewhere in the record, that at the commencement of the suit, as well as at the time the removal is asked, the requisite diversity of citizenship existed.³³

§ 805. Removal of suits between citizens and aliens.—Any suit of a civil nature, at common law or in equity, in which there is or shall be a controversy between citizens of a state, and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, which may be brought in any state court, may be removed into the federal circuit court to be held in the district where such suit is pending, by the defendant or defendants therein, being non-residents of that state; none but non-resident defendants can remove such suit, and, if there be more than one defendant, all of them must join in the application for removal.³⁴

§ 806. Removal on ground of “separable controversy.”—The third clause of the second section of the judiciary act declares that, when, in any suit mentioned in that section, “there shall be a controversy which is wholly between citizens of different states, and which can be determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.” It appears from the face of the act itself, that none but a defendant can remove a separable controversy; it is not required, however, that all the defendants, when there are more than one interested in the

³² 25 U. S. Stat. at L. ch. 866, secs. 1 and 2, p. 433; *Chicago, Rock Island & Pacific Ry. Co. v. Martin*, 245-251 (44:1055).

³³ *Mattingly v. Northwestern Virginia Railroad Co.*, 158 U. S. 53-57 (39:894); *Stevens v. Nich-*

ols, 130 U. S. 230 (32:914); *Jackson v. Allen*, 132 U. S. 27 (33:249); *La Conflance Campagne d'Assurance Contre l'Incendie v. Hall*, 137 U. S. 61 (34:573).

³⁴ 25 U. S. Stat. at L. ch. 866, secs. 1, 2 and 3, p. 433.

controversy, shall join in the application, but "either one or more of the defendants actually interested in the controversy may remove the suit."³⁵

§ 807. **Same—"Separable controversy" defined.**—It appears from the very terms of the statute,³⁶ that, in order to constitute a "separable controversy," which will authorize the removal of the suit, (1) there must be a controversy which is wholly between citizens of different states, and (2) that controversy must be one of such a character that it can be wholly determined as between them, and they must be the only parties who are indispensable to a complete judicial determination of that controversy and the granting of full and complete relief in respect to it, unto the party or parties in whose favor right and justice may be found. The word "controversy," in this provision of the statute, means "cause of action," in its technical sense, and as defined in the law of legal and equitable remedies administered in the federal courts under the grant of judicial power contained in the federal constitution; and the separability of any such "controversy" or "cause of action," from the other parts of any suit sought to be removed under this provision of the statute, is subject to and limited by the federal rule defining parties as formal parties, necessary parties, and indispensable parties, and which defines the latter class as those who not only have an interest in the subject-matter of the controversy, but an interest of such a nature that a final judgment or decree cannot be made without their presence in the suit, without either affecting their interests or leaving the controversy in such a condition as to them that its final determination may be wholly inconsistent with justice, equity and good conscience; and, accordingly, it is now definitely settled by judicial construction, reasoned out by a long and uniform line of decisions of the supreme court, that, within the meaning of the judiciary act, a "separable controversy" is a separate and distinct cause of action, alleged and existing within the suit sought to be removed, upon which a separate and distinct suit might have been brought and fully determined and complete relief afforded as to such cause of action, with all the

³⁵ 25 U. S. Stat. at L. ch. 866, sec. 2, p. 433; *Cochran v. Montgomery County*, 199 U. S. 260-274 (50:182).

³⁶ 25 U. S. Stat. at L. ch. 866, sec. 2, cl. 3, p. 433.

parties on one side citizens of different states from those on the other side, and without the presence as parties of any of the other persons originally made parties to the suit as it was actually instituted, and without either affecting the interests of such parties or leaving the controversy in such condition that its final determination is inconsistent with justice to them; and in any case, the question whether there is a "separable controversy" which will warrant the removal of the suit must be determined by the case made in plaintiff's declaration, bill, or complaint, at the time of filing the petition for removal, independently of the allegations in that petition or in the affidavit of the petitioner, unless the petitioner both alleges and proves that the defendants were wrongfully made joint defendants for the purpose of preventing a removal into the federal court; and the filing, by several defendants of separate defenses, presenting separate issues and questions for decision, while it may defeat a joint recovery, cannot create a "separable controversy," nor deprive a plaintiff of his right to prosecute his own suit to final determination in his own way.³⁷

³⁷ *Alabama Southern Ry. v. Thompson*, 200 U. S. 206-220 (50:441); *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92-103 (42:673); *Pirie v. Tvedt*, 115 U. S. 41, 43 (29:331); *Sloane v. Anderson*, 117 U. S. 275 (29:899); *Little v. Giles*, 118 U. S. 596, 601 (30:269); *Louisville & Nashville R. Co. v. Waugelm*, 132 U. S. 599 (33:474); *Torrence v. Shedd*, 144 U. S. 527 (36:528); *Connell v. Smiley*, 156 U. S. 335 (39:443); *Louisville & Nashville Railroad Co. v. Ide*, 114 U. S. 52-57 (29:63); *East Tennessee, Virginia & Georgia R. R. Co. v. Grayson*, 119 U. S. 240-244 (30:382); *Graves v. Corbin*, 132 U. S. 571-592 (33:462); *Fidelity Ins. T. & S. D. Co. v. Huntington*, 117 U. S. 280 (29:898); *Chesapeake & Ohio R. Co. v. Dixon*, 179 U. S. 131-141 (45:121); *Southern Ry. Co. v. Carson*, 194 U. S. 136-141 (48:907); *Bellaire v. Baltimore & Ohio R. Co.*, 146 U. S. 117-119 (36:910); *Whitcomb v. Smithson*, 175 U. S. 635-638 (44:303); *Merchants Cotton Press & Storage Co. v. Ins. Co. of North America*, 151 U. S. 368-389 (38:195); *Hyde v. Ruble*, 104 U. S. 407-410 (26:823); *Barney v. Latham*, 103 U. S. 205-206 (26:514); *Corbin v. Brunt*, 105 U. S. 576-578 (26:1176); *Wilson v. Oswego Township*, 151 U. S. 56-67 (38:70); *Fraser v. Jennison*, 106 U. S. 191-195 (27:131); *Ayers v. Wiswall*, 112 U. S. 187-193 (28:693); *Winchester v. Loud*, 108 U. S. 130 (27:677); *Shainwald v. Lewis*, 108 U. S. 158 (27:691); *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221-226 (50:448); *Wecker v. National Enameling & Stamping Co.*, 204 U. S. 176-186 (51:430).

§ 808. Same—Same—Action of tort against several defendants.—It is well settled that an action of tort, which might have been brought against many persons or against any one or more of them, and which is brought in a state court against all jointly, contains no separable controversy which will authorize its removal by some of the defendants into the circuit court of the United States, even if they file separate answers and set up different defenses from the other defendants, and allege that they are not jointly liable with them, and that their own controversy with the plaintiff is a separate one; for a defendant has no right to say that an action shall be several which the plaintiff elects to make joint. The cause of action is the subject-matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings. The question of removability must be determined by the cause of action stated by the plaintiff in his declaration or complaint.³⁸

§ 809. Same—Same—Same—Right of state to regulate actions for negligence.—A state has an unquestionable right by its constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for an injury resulting from negligence, and the plaintiff in due course of law and in good faith has filed a declaration or petition electing to sue for a joint recovery given by the laws of the state, the federal removal statute does not and cannot convert such action into a separable controversy for the purpose of removal, because of the presence of a non-resident corporation defendant therein, properly joined in the action under the constitution and laws of the state wherein it is conducting its business operations and is duly served with process.³⁹

§ 810. Same—Removal on this ground carries entire suit.—The removal of a separable controversy carries with it the entire suit into the federal court. This results from the language of the statute, which is: “then either one or more of the defendants

³⁸ *Powers v. Chesapeake & Ohio Ry. Co.*, 169 U. S. 92-103 (42:673); *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131-141 (45:121); *Southern Ry. Co., v. Carson*, 194 U. S. 136-141 (48:907); *Alabama Southern Ry. Co. v. Thompson*,

200 U. S. 206-220 (50:441); *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221-226 (50:448).

³⁹ *Cincinnati, New Orleans & Texas Pacific Ry. Co. v. Bohon*, 200 U. S. 221-226 (50:448).

actually interested in such controversy may remove *said suit* into the circuit court of the United States for the proper district." Not the separable controversy alone, when it exists, but the entire suit is removed.⁴⁰

§ 811. Removal on the ground of prejudice or local influence. The fourth clause of the second section of the judiciary act, treating of removals because of prejudice or local influence, does not furnish a separate and independent ground of federal jurisdiction, and describes only a special case comprised in the preceding clauses.⁴¹ By its provisions, any suit at law or in equity in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, brought in any state court, in which there is or shall be a controversy between a citizen of the state in which the suit is brought and a citizen of another state, may be removed into the circuit court of the district in which the suit is pending by any defendant, being such citizen of another state, at any time before the trial thereof, when it shall be made to appear to the circuit court, and that court shall be legally satisfied, from proof suitable to the nature of the case, that from prejudice or local influence he will not be able to obtain justice in such state court, or in any state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause; provided, that if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.⁴²

⁴⁰ *Barney v. Latham*, 103 U. S. 205-216 (26:514); *Connell v. Smiley*, 156 U. S. 335-343 (39:443); *Hoge v. Canton*, 103 Fed. R. 513; 25 U. S. Stat. at L. ch. 866, sec 2, cl. 3, p. 433.

⁴¹ *Cochran v. Montgomery Co.*, 199 U. S. 260-274 (50:182).

⁴² 25 U. S. Stat. at L. ch. 866, sec. 2, cl. 4, p. 433; *Cochran v. Montgomery County*, 199 U. S. 260-274 (50:182); *Ex parte Pennsylvania Company*, 137 U. S. 451-457 (34:738); *Fisk v. Henarie*, 142 U. S. 459-471 (35:1080); *Hanrick v. Hanrick*, 153 U. S. 192-198 (38:685).

§ 812. Same—No removal unless suit could have originally been brought in the circuit court.—The class of cases removable on the ground of prejudice or local influence is confined to those in which there is a controversy between a citizen or citizens of the state in which the suit is pending and a citizen or citizens of another or other states, and which, on that ground, could have been originally brought in the circuit court; and where a suit is brought in a state court in plaintiff's state, against a defendant, a citizen of the same state, who is an indispensable party, and also against a defendant who is a citizen of another state, the non-resident defendant cannot remove the case to the circuit court. The main purpose of the present judiciary act was to restrict the jurisdiction of the circuit courts, and, pursuing that policy, it established the rule that a suit to be removable must be within the original jurisdiction of the circuit court.⁴³

§ 813. Same—None but defendants can remove.—None but defendants can remove a case from a state court to a federal circuit court on the ground of prejudice or local influence; and the right can be exercised only by a defendant who is a citizen, or by defendants who are citizens of a state other than that in which the suit is pending. But it is not necessary that all the defendants should join in the application for removal.⁴⁴

§ 814. Same—Removal not allowed as between defendants.—The federal statute does not authorize one defendant to remove a suit from a state court into a federal circuit court, upon the ground of prejudice or local influence between himself and other defendants. The whole object of allowing a defendant to remove a suit or controversy into the circuit court of the United States is to prevent the plaintiff from obtaining any advantage over him by reason of prejudice or local influence; and unless such prejudice or influence is alleged and proved, he cannot be prevented, under the clause of the existing statute upon this subject, from prosecuting his suit against all the defendants in the court in which he originally brought it.⁴⁵

§ 815. Same—Application must be made to federal circuit court—When made.—Under the present judiciary act, unlike

⁴³ Cochran v. Montgomery Hanrick v. Hanrick, 153 U. S. 192-County, 199 U. S. 260-274 (50:182). 198 (38:685).

⁴⁴ Cochran v. Montgomery ⁴⁵ Hanrick v. Hanrick, 153 U. County, 199 U. S. 260-274 (50:182); S. 192-198 (38:685).

previous legislation on the subject, the application for removal on the ground of prejudice or local influence must be addressed to the federal circuit court, and not to the state court where the suit is pending; and, while the statute allows the removal of a suit upon this ground "at any time before the trial thereof," the petition for removal must be filed before or at the term at which it could be first tried, and before the trial thereof, and an application for removal filed after a trial of the suit in the state court comes too late.⁴⁶ There cannot be a removal after the hearing of a demurrer to a complaint because it does not state facts sufficient to constitute a cause of action.⁴⁷

§ 816. Same—Statutory jurisdictional amount must be involved.—The right to removal on the ground of prejudice or local influence does not exist in any case, unless the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars; the clauses of the second section of the present judiciary act, defining the different kinds of suits that

⁴⁶ *Fisk v. Henarle*, 142 U. S. 459-471 (35:1080).

⁴⁷ *Gregory v. Hartley*, 113 U. S. 742 (28:1150); *Alley v. Nott*, 111 U. S. 742 (28:491); *Laidly v. Huntington*, 121 U. S. 179 (30:883).

In delivering the opinion of the court in *Fisk v. Henarle*, supra., Chief Justice Fuller, construing the provision of the judiciary act of March 3, 1887, as corrected by the act of August 13, 1888, allowing removals for prejudice or local influence, said:

"We deem it proper to add that we are of opinion that the act of 1867, or subdivision third of section 639" (U. S. Rev. Stat.), "was repealed by the act of 1887. The subject-matter of the former act is substantially covered by the latter, and the differences are such as to render the intention of congress in this regard entirely clear.

"Under the previous acts the right of removal might be exer-

cised by plaintiff as well as defendant; the application was addressed to the state court; there was no provision for the separation of the suit; the ground of removal was based upon what the affiant asserted he had reason to believe and believed; the action on the motion to remand could be reviewed on appeal or writ of error or by mandamus; while under the latter act, the right is confined to the defendant; the application is made to the circuit court; the suit may be divided and remanded in part; the prejudice or local influence must be made to appear to the circuit court, that is, the circuit court must be legally satisfied, by proof suitable to the nature of the case, of the truth of the allegation that, by reason of those causes, the defendant will not be able to obtain justice in the state courts; and review on writ of error or appeal, or by mandamus is taken away."

may be removed, preserve throughout the same element of the value of the matter in dispute which is contained in the first section relating to the original jurisdiction of the circuit court, which is done by the provision giving the right of removal in suits "of which the circuit courts of the United States are given original jurisdiction" by the first section. Every element which is necessary to give the circuit courts of the United States original jurisdiction, as that jurisdiction is determined and defined in the first section of the act, is equally necessary to give the right of removal under the second section; and, as the right of removal on the ground of prejudice or local influence is given only in cases where there is a controversy between citizens of different states, under the second section, and the pecuniary amount is necessary in order to give jurisdiction on the ground of diversity of citizenship under the first section, it necessarily follows that there can be no removal in such cases without the existence of the stated pecuniary value.⁴⁸

§ 817. Procedure to remove causes—Petition and bond—When to be filed.—The procedure for the removal of causes is quite simple. Except in cases removable on the ground of prejudice or local influence, any party entitled to remove any suit may make and file a petition therein in the state court, at the time or any time before the defendant is required by the laws of the state or rule of the state court, in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, "for the removal of the suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if such special bail was originally required therein;" and "it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as afore-

⁴⁸ *Malone v. Richmond & Dan-* 451-457 (34:738); *Cochran v.*
ville R. Co., 35 Fed R. 625; *Ex* *Montgomery County*, 199 U. S. 260-
parte Pennsylvania Co., 137 U. S. 274 (50:182).

said in the said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court.”⁴⁹

§ 818. **Same—Application must be made when plea is due.—**

The statute is imperative that, with the exception of cases removable on the ground of prejudice or local influence, the application to remove a suit from a state court into a federal circuit court must be made at or before the time when defendant’s plea or answer is due in the state court. The defendant asking a removal must file his petition and bond at or before the time when he “is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff;” and the failure of plaintiff to take judgment by default when defendant fails to appear and plead in time does not extend the time for filing the application for removal.⁵⁰

§ 819. **Same—Same—When suit becomes a removable one after plea is due.—**A suit which is not a removable one at the time when defendant is required by the laws of the state or the rule of the state court in which it is brought to answer or plead, may become such afterward by discontinuing as to a defendant who is a citizen of the same state as plaintiff, or by amending the *ad damnum* clause of the declaration, or other fortuitous circumstance; and in such case the defendant is not to lose his right of removal, if he file his petition and bond as soon as the action assumes the shape of a removable cause in the court in which it was brought. And it has been, accordingly, held that, where, after a case had been removed to the circuit court and remanded because there was no separable controversy, and after it was called for trial in the state court, the plaintiff discontinued his action against all the defendants who were citizens of the same state with the plaintiff, leaving it an action wholly between citizens of different states, and the case then became for the first time a removable one, and the single remaining defendant thereupon immediately filed a second petition and bond for removal, the application was in time and the defendant was entitled to

⁴⁹ 25 U. S. Stat. at L. ch. 866, sec. 3, p. 433; *Kansas City, Fort Scott & Memphis Railroad Co. v. Doughty*, 133 U. S. 298-306 (34:963).

⁵⁰ *Kansas City, Fort Scott & Memphis Railroad Co. v. Doughty*, 138 U. S. 298-306 (34:963); *Martin v. Baltimore & Ohio R. Co.*, 151 U. S. 673-710 (38:311).

the removal. The decision of the case was rested upon the ground that, the reasonable construction of the act of congress, and the only one which will prevent the right of removal, to which the statute declares the defendant to be entitled, from being defeated by circumstances wholly beyond his control, is to hold that the incidental provision as to the time must, when necessary to carry out the purpose of the statute, yield to the principal enactment as to the right, and to consider the statute as, in intention and effect, permitting and requiring the defendant to file a petition for removal as soon as the action assumes the shape of a removable cause in the court in which it was brought.⁵¹

§ 820. **Same—What petition for removal should show.**—The right to remove a cause from a state court into a circuit court of the United States is purely statutory, and before a party can avail himself of the right he must show upon the record that his case comes within the provisions of the statute. His petition, when filed, becomes a part of the record in the cause, and it should contain a statement of facts, which, taken in connection with such as already appear from the record in the suit, entitle him to a removal; and if he fail in this he has not, in law, shown to the state court that it should “proceed no further in the suit.” The state court, having once acquired jurisdiction over the suit, it may lawfully proceed with it until it is made to appear that its jurisdiction has been divested, and vested in the federal circuit court.⁵²

§ 821. **Same—Issues of fact must be tried in the circuit court.** It is well settled that issues of fact raised upon petitions for the removal of causes from state courts must be tried in the federal circuit courts, the *ratio decidendi* being that, by the filing of a sufficient petition and bond, the suit is in law removed, and the jurisdiction of the state court is divested, and it can “proceed no further in the suit.” The record closes, so far as the question of removal is concerned, when the petition for removal is filed and the necessary security is furnished, and it presents then to the state court a pure question of law, and that is, whether, admitting the facts stated in the petition for removal to be true,

⁵¹ *Powers v. Chesapeake & Ohio R. Co.*, 169 U. S. 92-103 (42:673). 95 U. S. 183-186 (24:427); *Amory v. Amory*, 95 U. S. 186-187 (24:

⁵² *Phoenix Ins. Co. v. Pechner*, 428).

it appears on the face of the record, which includes the petition and the pleadings and proceedings down to that time, the petitioner is entitled to a removal of the suit, and that question the state court may decide for itself.⁵³

§ 822. Same—When citizens of same state claim land under grants of different states.—In suits commenced in state courts in which the title of land is concerned between citizens of the same state, claiming the land under grants from different states, a removal is not allowed until the state court ascertains the actual existence of such an issue in the manner pointed out in the statute; and, after the issue is found to exist, petition and bond for removal may be filed.⁵⁴

§ 823. Procedure for the removal of causes on the ground of prejudice or local influence.—The Judiciary Act of March 3, 1887, as corrected by the act of August 13, 1888, prescribes no procedure for the removal of causes on the ground of prejudice or local influence under the act from state courts into the federal circuit courts; but the supreme court has declared that the proper procedure is for the defendant seeking the removal to file his petition in the federal circuit court of the proper district, alleging the grounds of the removal, and submitting evidence to sustain his allegations, and to obtain from that court an order for the removal of the cause, file that order in the state court, and take from it a transcript of the record of the cause and file it in the federal court. The statute being silent as to the mode of procedure, the general rules in respect to transfer of cases from one court to another must obtain; and if the order of one court is to divest the jurisdiction and stay the action of another, the latter is entitled to notice; and if a case is to pass from one court to another, this is done by filing a transcript of the record of the one in the other.⁵⁵

§ 824. Same—Judicial inquiry into the facts.—The statute contemplates that, when an application is made for a removal on the ground of prejudice or local influence, there shall be a

⁵³ Burlington, Cedar Rapids & Northern Ry. Co. v. Dunn, 122 U. S. 513-517 (30:1159); Stone v. South Carolina, 117 U. S. 432 (29:962); Carson v. Hyatt, 118 U. S. 279 (30:167); Carson v. Dunham, 121 U. S. 421 (30:992); Crehore v. Ohio & Mississippi R. Co., 131 U.

S. 240-245 (33:144); Kansas City Fort Scott & Memphis Railroad Co. v. Doughty, 138 U. S. 298-306 (34:963).

⁵⁴ 25 U. S. Stat. at L. ch. 866, sec. 3, p. 433.

⁵⁵ Pennsylvania Company v. Bender, 148 U. S. 255-261 (37:441).

judicial inquiry into the facts, and the court must take the responsibility of determining and adjudging, judicially, that prejudice or local influence exists before it can order the removal, and its judgment on the question must be reached by the customary and approved methods of investigation in such matters. The petition for removal should state facts which, according to good pleading, show the existence of prejudice or local influence to such an extent that the defendant applying for the removal will not be able to obtain justice in the state court, or in any other state court to which the defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove the cause; if practicable, the adverse party should have reasonable notice of the application for removal and an opportunity to contest it, and when the court comes to act upon the issues of fact thus raised it may receive evidence upon such issue or issues by affidavits which state the facts, or by depositions, or by oral examination of witnesses. The question should be determined by the court as it would determine any other issue of fact arising in the progress of the case affecting its own jurisdiction and the rights of the parties.⁵⁶

§ 825. Remanding causes to the state courts.—By the first clause of section five of the judiciary act of March 3, 1875, which clause is still in force, it is provided: "That if, in any suit commenced in a circuit court or removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just;"⁵⁷ and the last clause of said section five, which allowed a

⁵⁶ *Schwenk v. Strong*, 8 C. C. A. 451-457 (34:738); *Fisk v. Henarie*, 92; *Malone v. Richmond & Dan-* 142 U. S. 459-471 (35:1080).
ville R. Co., 35 Fed. R. 625; *Ex* ⁵⁷ 18 U. S. Stat. at L. ch. 137,
parte *Pennsylvania Co.*, 137 U. S. sec. 5, p. 470-473.

review by the supreme court on writ of error or appeal of the order of the circuit court dismissing or remanding a cause, was repealed by the sixth section of the present judiciary act,⁵⁸ and the second section of the last named act provides that:

“Whenever any cause shall be removed from a state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding the cause shall be allowed.”⁵⁹

§ 826. **Same—Effect of this legislation.**—The effect of the provisions of the present judiciary act mentioned in the section next preceding was to make the order of the circuit court remanding a cause to the state court a final and conclusive judgment, and to take away the right of review by writ of error, appeal, or by writ of mandamus;⁶⁰ and if the circuit court remands a cause and the state court proceeds to final judgment, the action of the circuit court is not reviewable on a writ of error to the judgment of the state court, as the state court cannot be held to have decided against a federal right, when it is the circuit court and not the state court which has denied the existence of such right.⁶¹

§ 827. **Same—Remanded because not removed within the time allowed by law.**—When the petition for removal is not filed in the state court within the time required by the federal statutes, if a motion to remand be promptly filed it must be sustained, and if denied the judgment of the circuit court will, upon writ of error or appeal, be reversed, with directions to remand the case to the state court. But the time of filing a petition for the removal of a suit from a state court into the circuit court of the United States for trial is not a fact in its nature essential to the jurisdiction of the federal courts, and a non-compliance with the statute as to the time of filing the petition

⁵⁸ 25 U. S. Stat. at L. ch. 866, sec. 6, p. 433.

⁵⁹ 25 U. S. Stat. at L. sec. 2, p. 433.

⁶⁰ *Ex parte Pennsylvania Company*, 137 U. S. 451-457 (34:738); *Powers v. Chesapeake & Ohio R.*

Co., 169 U. S. 92-103 (42:673); *Morey v. Lockhart*, 123 U. S. 56 (31:68); *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556-584 (40:536).

⁶¹ *Missouri Pacific R. Co. v. Fitzgerald*, 160 U. S. 556-584 (40:536).

is waived if not seasonably objected to by the plaintiff; and if the objection is not taken until after the case has proceeded to trial in the federal court it comes too late. It is not a matter which goes to the jurisdiction of the court.⁶²

§ 828. Removal of suits against persons denied civil rights.—A federal statute provides that: “When any civil suit or criminal prosecution is commenced in any state court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the state, or in the part of the state where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights, as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said state court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending.” The statute then prescribes the procedure for removal, and for the issuance of a writ of habeas corpus *cum causa*, when the defendant is in custody.⁶³

This legislation does not give the right to remove a criminal prosecution, unless the constitution or laws of the state in which it is pending, as interpreted by its highest judicial tribunals, stand in the way of the enforcement of rights secured equally to all citizens of the United States. There is no right of removal when the alleged discrimination against an accused person, in respect of his equal rights, is due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the state, as interpreted by its highest courts, nor where there is a possibility that during the trial of the cause the court may not respect or enforce the right of the accused to the equal protection of the laws.⁶⁴

⁶² French v. Stewart, 22 Wall. 238 (22:854); Taylor v. Longworth, 14 Pet. 172 (10:405); Ayers v. Watson, 113 U. S. 594 (28:1093); Martin v. Baltimore & Ohio R. Co., 151 U. S. 670-710 (38:311).
⁶³ U. S. Rev. Stat. secs. 641, 642; 4 Fed. Stat. Anno. 258-260; U. S. Comp. Stat. 1901, pp. 520, 521.
⁶⁴ Kentucky v. Powers, 201 U. S.

§ 829. Removal of suits against revenue officers.—A federal statute authorizes the removal into the federal circuit court of any civil suit or criminal prosecution commenced in any court of any state against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such law; and the statute prescribes the procedure for such removal.⁶⁵

§ 830. Same—Prosecution of crimes against the states belong to their courts—Exception.—The prosecution and punishment of crimes and offenses committed against the states of the union belong to the courts and authorities of the states, each respectively, and can be interfered with by the circuit courts of the United States so far only as congress, in order to maintain the supremacy of the constitution and laws of the United States, has expressly authorized either by a removal of the prosecution into the circuit court of the United States for trial, or a discharge of the prisoner by writ of habeas corpus issued by that court or a judge thereof.⁶⁶

1-40 (50:633); *Strauder v. West Virginia*, 100 U. S. 300 (25:664); *Virginia v. Reves*, 100 U. S. 313 (25:667); *Neal v. Delaware*, 103 U. S. 370 (26:567); *Bush v. Kentucky*, 107 U. S. 110 (27:354); *Smith v. Mississippi*, 162 U. S. 592-602 (40:1082); *Gibson v. Mississippi*, 162 U. S. 565-592 (40:1075); *Murray v. Louisiana*, 163 U. S. 101-109 (41:87).

⁶⁵ U. S. Rev. Stat. sec. 643, as changed by the act of Feby. 8,

1894, 28 U. S. Stat. at L. ch. 25, sec. 1, p. 36; 4 Fed. Stat. Anno. pp. 260, 261; 2 Fed. Stat. Anno. p. 866; *Tennessee v. Davis*, 100 U. S. 257-302 (25:648); *Davis v. South Carolina*, 107 U. S. 597-601 (26:574); *Virginia v. Paul*, 148 U. S. 107-124 (37:386).

⁶⁶ *Virginia v. Paul*, 148 U. S. 107-124 (37:386) and authorities cited; *Cunningham v. Neagle*, 135 U. S. 1-99 (34:55).

CHAPTER XVII.

THE DISTINCTION BETWEEN LAW AND EQUITY AND LEGAL AND EQUITABLE REMEDIES PRESERVED IN THE FEDERAL COURTS.

(a) STATEMENT OF THE GENERAL DOCTRINE.

- § 831. The judicial power of the United States Embraces three classes of cases.
832. The distinction between law and equity and legal and equitable remedies established by the constitution.
833. The distinction between legal and equitable remedies is one of substance.
834. The rule requiring legal and equitable remedies to be separately pursued not changed by federal adoption of state procedure in actions at law.
835. Same—Action of assumpsit or debt on simple contract and creditor's bill cannot be blended in one suit in the federal courts.
836. Same—Actions at law cannot be brought in federal equity, nor legal and equitable claims blended in one suit.
837. Same — Same — Jury summoned to try issues in chancery not the equivalent of constitutional right of trial by jury in a court of law.
838. Same — Same — Bill in equity to remove cloud not maintainable when plaintiff has legal title and defendant is in possession.
- § 839. Same — Same — Same — When the lands are wild and unoccupied.
840. Assignee of chose in action cannot without "special circumstances" sue in equity to collect it.
841. Equity no jurisdiction of a naked accounting of profits and damages against infringer of patent.
842. A proceeding to assess damages for taking private property for public use cannot be joined with a proceeding to enjoin the taking.
843. Federal courts have no jurisdiction of a bill in equity in cases of fraud to recover damages.
844. Federal courts sitting as courts of law cannot entertain suits in equity.
845. Same—Mechanics lien cannot be enforced in an action at law in the federal courts.
846. Same—Suit to enjoin collection of taxes in state of Louisiana.
847. Equitable defenses cannot be interposed to actions at law.
848. Same — Equitable set-off

cannot be interposed as a defense to an action at law.

§ 849. Federal courts will enforce new equitable rights created by state statutes—limitation upon the rule.

850. Same—Whether a case is one of common law or equitable cognizance determined by its essential character.

851. A federal court sitting in equity has no jurisdiction of the common law action of *assumpsit*.

852. Legal defenses to purely legal demands cannot be availed of by bill in equity.

853. Same—Bill in equity will not lie to cancel life insurance policy for fraud, after death of *cestui que vie*.

854. Same—Action at law on municipal bonds not enjoined on ground of fraud.

855. Same—Action of ejectment not enjoined upon the ground that plaintiff's muniments of title are void.

(b) SUITS TO RECOVER LAND.

856. Federal courts have no jurisdiction of suits in equity to recover land.

857. Same—Ejectment bill not aided by prayer for an accounting.

858. Same—Ejectment bill cannot be maintained upon an equitable title.

859. The legal title necessary to maintain the action of ejectment.

860. Same—No exception to the rule at common law—

Lord Mansfield's doctrine based upon the presumption that legal estate had been conveyed to the equitable owner.

§ 861. Same — Same — Same — *Fenn v. Holme*.

862. Same — Same — Same — Lord Mansfield's doctrine followed in the Federal courts.

863. Patents issued by the United States are conclusive evidence of the legal title.

864. Same—Jurisdiction of the land department.

865. Patents necessary to convey legal title under swamp land act of 1850.

866. Exceptions to the rule requiring patent to convey the legal title to public lands.

867. Void patents may be collaterally attacked.

868. Ejectment not maintainable on certificates of registers and receivers of the government land offices—Statutes of Arkansas and Nebraska.

869. Mississippi statute declaring that land office certificates shall vest legal title—Not binding on Federal courts.

870. Ejectment not maintainable in the Federal courts sitting in California on certificates of land purchase issued by that state.

871. Ejectment not maintainable in the Federal courts on land certificates, location and survey issued and made under the laws of Texas.

§ 872. Ejectment maintained in the Federal courts in Pennsylvania on warrant and survey.

873. Ejectment maintained in the Federal courts on prior possession.

874. Ejectment maintained in the Federal courts on legal title by estoppel.

875. Plaintiff could not recover in ejectment at common law upon a title which did not subsist in him at the commencement of the action.

876. Equitable titles cannot be interposed as a defense to the action of ejectment.

877. Same — Title-bond and purchase money paid.

878. Same—Defendant not allowed to prove that pat-

ent was issued through mistake—Bagnell v. Broderick.

§ 879. Same — Defendant not allowed to prove elder patent was founded on junior entry—Robinson v. Campbell.

880. Same—Defendant not allowed to show fraudulent survey.

881. Equitable estoppel may be set up at law as a defense to an action of ejectment.

882. Whatever tolls plaintiff's right of entry will defeat the action of ejectment.

883. Cross bill in equity not maintainable to recover land on a legal title.

(a) STATEMENT OF THE GENERAL DOCTRINE.

§ 831. The judicial power of the United States embraces three classes of cases.—The constitution vests in the federal judiciary jurisdiction in three distinct classes of cases, namely: (1) cases in law, (2) cases in equity, and (3) cases of admiralty and maritime jurisdiction.¹ The distinction between these classes of cases is clearly marked in the constitution.²

§ 832. The distinction between law and equity, and legal and equitable remedies established by the constitution.—The federal constitution, itself, established the distinction between common law and equity jurisprudence, and the distinction between the common law and equity jurisdiction of the federal courts, and the distinction between common law and equitable remedies and procedure, as they were then distinguished and defined in England, and imposed the requirement that, in the federal courts, legal and equitable remedies shall be *separately pur-*

¹ U. S. Const. art. III, sec. 2.

² Insurance Co. v. Canter, 1 Pet. 511 (7:242); Bennett v. But-

terworth, 11 How. 669 (13:859);

Scott v. Armstrong, 149 U. S. 499, 512 (36:1059).

sued, and shall not be amalgamated or blended into one system of remedies;³ and, this being true, congress has no power to abolish the distinction between law and equity and legal and equitable remedies.

§ 833. **The distinction between legal and equitable remedies is one of substance.**—The distinction between causes of action at law and suits in equity is one of substance and not of form, merely, resting in the nature of the transactions out of which they arise, and the principles of law and jurisprudence which define and regulate the nature and character of the relief to which the injured party is entitled; and the distinction between legal and equitable remedies, and the requirement that they shall be separately pursued, are matters of substance, as well as of form, for the reason that, under the federal constitution, the parties in an action at law are entitled to a trial of all issues of fact by a jury, while in a suit in equity they have no such right, and no suit in equity can be maintained where there is a plain, adequate and complete remedy at law, nor can an action at law be maintained in equity, nor is an equitable cause of action or defense available at law.⁴

§ 834. **The rule requiring legal and equitable remedies to be separately pursued not changed by federal adoption of state procedure in actions at law.**—The federal statute,⁵ which provides that the practice, pleadings, and forms and modes of proceeding in civil causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time in like causes in the courts of record of the states within which such circuit

³ *Bennett v. Butterworth*, 11 How. 669 (13:589); *Fenn v. Holme*, 21 How. 481, 488 (16:198); *Robinson v. Campbell*, 3 Wheat. 207 (4:372); *Boyle v. Zacharie*, 6 Pet. 648 (8:532); *Thompson v. Railroad Co.*, 6 Wall. 134, 139 (18:765); *Ex parte Sawyer*, 124 U. S. 200, 225 (31:402); *Scott v. Neely*, 140 U. S. 111 (35:360); *Cates v. Allen*, 149 U. S. 451, 465 (37:804); *Scott v. Armstrong*, 146 U. S. 499, 512 (36:1059); *Lindsay v. Bank*, 156 U. S. 485, 493 (39:505); *Root*

v. Railway Co., 105 U. S. 189, 217 (26:975).

⁴ *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186; *Bag-nell v. Broderick*, 13 Pet. 436 (10:235); *Foster v. Mora*, 98 U. S. 425, 428 (25:191); *Scott v. Armstrong*, 146 U. S. 499, 512 (36:1059); *Lindsay v. Bank*, 156 U. S. 485, 493 (39:505); *Schofield v. Rhodes*, 22 C. C. A. 95, 97; *Davis v. Davis*, 18 C. C. A. 438, 440.

⁵ U. S. Rev. Stat. sec. 914, 4 Fed. Stat. Anno. 563-577.

and district courts are held, in terms excludes equity causes therefrom, and the jurisprudence of the United States has always recognized the distinction between law and equity, and legal and equitable remedies, under the constitution, as matters of substance, as well as of form and procedure; and, accordingly, legal and equitable claims cannot be blended together in one suit in the courts of the United States, nor are equitable defenses permitted to be interposed to actions at law, although such procedure is allowed by the state law and pursued in the state courts. The federal adoption of state procedure in actions at law was not an abandonment, nor even a modification of the federal rule by which the distinction between law and equity had been theretofore maintained, and requiring legal and equitable remedies to be separately pursued.⁶

§ 835. Same—Action of assumpsit or debt on simple contract and creditor's bill cannot be blended in one suit in the federal courts.—The constitution of the United States, in creating and defining the judicial power of the general government, having established the distinction between law and equity, and required that in the federal courts legal and equitable remedies shall be separately pursued, equitable relief in aid of mere legal demands cognizable in the courts of the United States only on their law side, cannot be sought and obtained in the same action, although allowable in the state courts by virtue of state legislation; and it has been, accordingly held that, a state statute which allows an action of assumpsit or debt on a simple contract, and a creditor's bill to vacate a fraudulent conveyance and apply the property to the payment of the debt, to be blended together and treated as one suit in equity in the state courts, to be heard and disposed of without a trial by jury, cannot be enforced in the circuit courts of the United States, because such a proceeding would be in contravention of the constitutional provision securing the right to trial by jury in all suits at common law where the value in controversy exceeds twenty dollars.⁷

⁶ *Scott v. Armstrong*, 146 U. S. 499, 513 (36:1059); *Lindsay v. Bank*, 156 U. S. 485, 494 (39:505); *Scott v. Neely*, 140 U. S. 106 (35:358); *Cates v. Allen*, 149 U. S. 451, 465 (37:804); *Bennett v. Butterworth*, 11 How. 669 (13:859); *Thompson v. Railway Co.*, 6 Wall. 134 (18:765); *Dravo v. Fabel*, 132 U. S. 487, 490 (33:421); 4 Fed. Stat. Anno. 563-577, notes on sec. 914, U. S. Rev. Stat.

⁷ *Scott v. Neely*, 140 U. S. 106 (35:358); *Cates v. Allen*, 149 U.

§ 836. **Same—Actions at law cannot be brought in federal equity, nor legal and equitable claims blended in one suit.**—All actions which seek to recover specific property, real or personal, with or without damages for its detention, or a money judgment for a breach of a simple contract, or as damages for injury to person or property, are legal actions, and can be brought in the federal courts only on their law side, and such demands do not lose their character as claims cognizable in the courts of the United States only on their law side, because in some state courts, by virtue of state legislation, equitable relief in aid of the demand at law may be sought and obtained in the same suit in which the legal demand is sued upon. The constitutional right of trial by a jury in actions at law cannot be impaired by bringing such actions on the equity side of the court, nor by blending with a legal claim a demand for equitable relief in aid of the legal action. Such equitable aid in the federal courts must be sought in a separate suit, to the end that the right to trial by jury in the legal action may be preserved. The remedies in the courts of the United States are, at common law or in equity, not according to the practice of the state courts, but according to the principles of common law and equity as distinguished and defined in that country from which we derived our knowledge of these principles. Although the forms of procedure in actions at law in the state courts have been adopted in the federal courts, yet the adoption of that procedure has not had the effect to confound the principles of law and equity, nor to authorize legal and equitable claims to be blended together in one suit.⁸

§ 837. **Same—Same—Jury summoned to try issues in chancery not the equivalent of constitutional right of trial by jury in a court of law.**—If, in the federal courts, an action at law could be tried by the court sitting in equity, the right of trial

S. 451, 465 (37:804); *Hollins v. Coal & Iron Co.*, 150 U. S. 371, 387 (37:1113).

⁸ *Scott v. Neely*, 140 U. S. 106, 117 (35:358); *Cates v. Allen*, 149 U. S. 451, 465 (37:804); *Bennett v. Butterworth*, 11 How. 669 (13:859); *Thompson v. Railway Co.*, 6 Wall. (18:765); *Hipp v. Babin*, 19 How. 271, 278 (15:633); *Lewis v. Cocks*, 23 Wall. 466, 470 (23:70);

Killian v. Ebbinghaus, 110 U. S. 568, 573 (28:246); *Buzard v. Houston*, 119 U. S. 347, 351 (30:451); *Whitehead v. Shattuck*, 138 U. S. 146, 156 (34:873); *Robinson v. Campbell*, 3 Wheat. 212 (4:372); *Hurt v. Hollingsworth*, 100 U. S. 100, 104 (25:569); *Jones v. McMaster*, 20 How. 210 (15:805).

by jury, in suits at common law, where the value in controversy exceeds twenty dollars, secured by the seventh amendment to the constitution, would be defeated, because in the federal courts of equity a jury can be summoned only at the discretion of the court, to ascertain certain facts for its enlightenment, and the verdict is advisory only, and the trial of issues before such a jury is not the equivalent of a trial of all issues of fact by a jury in a court of common law, as secured by the constitutional provision;⁹ and, therefore, whenever a court of law is competent to take cognizance, and has power to proceed to a judgment which affords a plain, adequate and complete remedy at law, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.¹⁰ A suit in equity to enforce a legal right can be maintained only when the court can give more complete and effectual relief, in kind or degree, on the equity side, than on the common-law side; as, for instance by compelling a specific performance, or the removal of a cloud from the title to real estate; or preventing an injury for which damages are not recoverable at law; or where an agreement procured by fraud, is of a continuing nature, and its rescission will prevent a multiplicity of suit.¹¹

§ 838. Same—Same—Bill in equity to remove cloud not maintainable when plaintiff has legal title and defendant is in possession.—One who holds the legal title to land, and has the right to its immediate possession, has a plain, adequate and complete remedy at law, against one who is in possession and wrongfully withholds it under a documentary title which is fraudulent and void; and a federal court of equity has no jurisdiction in such a case to entertain a bill brought by the holder of the legal title, against the party in possession, to cancel his

⁹ *Cates v. Allen*, 149 U. S. 451, 465 (37:804); *Whitehead v. Shattuck*, 138 U. S. 146, 156 (34:873).

¹⁰ *Hipp v. Babin*, 19 How. 271, 278 (15:633); *Whitehead v. Shattuck*, 138 U. S. 146, 151 (34:873); *Buzard v. Houston*, 119 U. S. 347, 355 (30:451); *Insurance Co. v. Bailey*, 13 Wall. 616, 621 (20;

501); *Grand Chute v. Winegar*, 15 Wall. 373, 375 (21:174); *Lewis v. Cocks*, 23 Wall. 466, 470 (23:70); *Root v. Railway Co.*, 105 U. S. 189, 212 (26:975); *Killian v. Ebbinghaus*, 110 U. S. 568, 573 (23:246).

¹¹ *Buzard v. Houston*, 119 U. S. 347, 355 (30:451), and authorities cited.

claim as a cloud upon the title, although such a suit may be maintained in the state courts, by virtue of a state statute.¹²

§ 839. Same—Same—Same—When the lands are wild and unoccupied.—When lands are unoccupied, wild and uncultivated, neither party being in possession, the federal courts will entertain a bill in equity by the true owner to cancel the claim of an adverse claimant, as a cloud upon his title, where such remedy is allowed in the state courts by state statute.¹³

§ 840. Assignee of chose in action cannot without "special circumstances" sue in equity to collect it.—The assignee of a chose in action cannot proceed by bill in equity to collect it, merely because he cannot sue at law in his own name. If the assignor will permit suit in his name for the use of the assignee, then the remedy at law is plain, adequate and complete, and equity has no jurisdiction of the cause. If the assignee is unable to assert in a court of law the legal right of the assignor, which in equity is vested in him, then the jurisdiction of a court of equity may be invoked, because it is the proper forum for the enforcement of equitable interests, and also because there is no adequate remedy at law; but when the equitable title is not involved in the litigation, and the remedy is sought merely for the purpose of enforcing the legal right of the assignor, there is no ground for an appeal to equity, because, by an action at law in the name of the assignor, the disputed right may be perfectly and completely vindicated, and the wrong done by the denial of it fully vindicated.¹⁴

§ 841. Equity no jurisdiction of a naked accounting of profits and damages against infringer of patent.—It is the settled doctrine of the supreme court of the United States, that a federal circuit court has no jurisdiction of a bill in equity for a naked accounting of profits and damages against an infringer of a patent, but such relief is ordinarily incidental to some other

¹² *Whitehead v. Shattuck*, 138 U. S. 146, 156 (34:873); *Gordon v. Jackson*, 72 Fed. R. 88; *Gombert v. Lyon*, 80 Fed. R. 305; *Erschine v. Forest Oil Co.*, 80 Fed. R. 586; *Blythe v. Hinckley*, 84 Fed. R. 256; *Davidson v. Calkins*, 92 Fed. R. 232.

¹³ *Holland v. Challen*, 110 U. S. 15, 26 (28:52); *More v. Steinbach*,

127 U. S. 70, 85 (32:51); *Harding v. Gulce*, 80 Fed. R. 164.

¹⁴ *Hayward v. Andrews*, 106 U. S. 672, 679 (27:271); *Walker v. Brooks*, 125 Mass. 241; *Hammond v. Messenger*, 9 Sim. 327, 332; *Guaranty and Indemnity Co. v. Water Co.*, 107 U. S. 205, 215 (27:484).

relief which constitutes the ground of equity jurisdiction, the right to enforce which gives the patentee his standing in the court of equity. The most usual ground for equitable interposition in such cases is a bill for injunction to restrain the continuance of the infringement, but other grounds of relief may arise, and to these an accounting may be added as an incident.¹⁵

§ 842. **A proceeding to assess damages for taking private property for public use cannot be joined with a proceeding to enjoin the taking.**—A bill in equity which seeks a decree setting aside and vacating an award of damages made by referees for private property sought to be taken for the purposes of railway construction, and to perpetually enjoin the railway company from locating, constructing and maintaining a railway through the property, presents an equitable cause of action, and seeks relief of an equitable nature; but a proceeding for an assessment of damages for the taking of private property for public use is one at law, and possesses none of the essential elements of a suit in equity within the meaning of the statutes defining the jurisdiction of the courts of the United States, and cannot be joined with a suit to enjoin the taking, to have the damages assessed in the event the injunction is denied.¹⁶

§ 843. **Federal courts have no jurisdiction of a bill in equity in case of fraud to recover damages.**—The courts of the United States, sitting in equity, will not sustain a bill in cases of fraud and deceit to obtain only a decree for the payment of money, by way of damages, when the like amount may be recovered at law in an action sounding in tort.¹⁷

§ 844. **Federal courts sitting as courts of law cannot entertain suits in equity.**—A circuit court of the United States, sitting as a court of law, has no jurisdiction to entertain suits in equity; nor can they substitute the machinery of a court of law, in which the facts are found by the jury and the law prescribed by the judge, for the usual and legitimate procedure of a court of equity.¹⁸

¹⁵ *Root v. Railway Co.*, 105 U. S. 189, 217 (26:975).

¹⁶ *Cherokee Nation v. Southern Kansas R. Co.*, 135 U. S. 641, 661 (34:295).

¹⁷ *Buzard v. Houston*, 119 U. S.

347, 355 (30:451); *Ambler v. Chouteau*, 107 U. S. 586 (27:322).

¹⁸ *Lindsay v. Bank*, 156 U. S. 485-494 (39:505); *Sheffield Furnace Co. v. Witherow*, 149 U. S. 574, 580 (37:853).

§ 845. Same—Mechanic's lien cannot be enforced in an action at law in the federal courts.—Although a mechanic's lien is a creature of a state statute, and the statute creating it gives as a remedy for its enforcement an action at law, yet, it is, nevertheless, true that a proceeding to enforce it is essentially a suit in equity, requiring, in many cases, an accounting, specific directions for the sale of the property, such as are usually given upon the foreclosure of mortgages and the sale of the property; and a state cannot, by prescribing an action at law to enforce the statutory lien, oust a federal court, sitting in equity, of its jurisdiction to enforce such right, nor can a state confer upon a federal court, sitting as a court of law, jurisdiction of an equitable proceeding to enforce a lien, although such lien is created by a statute of the state, together with a legal remedy for its enforcement in the state courts.¹⁹

§ 846. Same—Suit to enjoin collection of taxes in state of Louisiana.—A circuit court of the United States, sitting as a court of law in the state of Louisiana, has no jurisdiction to entertain a suit which seeks a decree enjoining or modifying a tax assessment, proceeded with and tried as an action at law, although the proceedings in the case are in conformity with the procedure and practice in the courts of the state, in which no distinction is made between legal and equitable remedies; such a case is a suit in equity, and upon exception to the jurisdiction at law being duly made and overruled, in the lower court, the supreme court will, upon appeal, direct a dismissal, and will not sustain so plain an attempt to substitute the machinery of a court of law for the usual and legitimate procedure of a court of chancery.²⁰

§ 847. Equitable defenses cannot be interposed to actions at law.—The constitutional rule of the federal judiciary, which maintains the distinction between law and equity, and requires legal and equitable remedies to be separately pursued, and forbids the blending of legal and equitable claims together in one suit, in like manner prohibits the interposing of equitable defenses to actions at law; and this branch of the rule is just as rigidly enforced, as that which requires the plaintiff to hold the

¹⁹ *Sheffield Furnace Co. v. Land Imp. Co. v. Bradbury*, 132 Witherow, 149 U. S. 574, 580 (37: U. S. 509 (33:433).

853); *Davis v. Alvord*, 94 U. S. 545, 546 (24:238); *Idaho & O.* ²⁰ *Lindsay v. Bank*, 156 U. S. 485, 494 (39:505).

legal title in order to maintain his action at law, and is, indeed, its corollary.²¹

§ 848. **Same—Equitable set-off cannot be interposed as a defense to an action at law.**—Under the constitutional rule controlling the federal judiciary, a court of law of the United States can no more take cognizance of an equitable defense to an action at law, than a court of equity can entertain a suit upon a purely legal title;²² and a court of law of the United States, sitting in the state of Ohio, has no jurisdiction to entertain and allow a plea of equitable set-off interposed as a defense to a common-law action of debt or assumpsit founded upon a promissory note, although the code of procedure of Ohio abolishes the distinction between actions at law and suits in equity, and requires all actions to be brought in the name of the real party in interest, and permits all defenses, counter-claims, and set-offs, whether formerly known as legal or equitable, to be set up in such actions.²³

§ 849. **Federal courts will enforce new equitable rights created by state statute—Limitation upon the rule.**—It is not within the legal competency of the legislatures of the several states to prescribe the forms and modes of proceeding in the courts of the United States, nor to define or enlarge or restrict their jurisdiction; but when a state has, by legislative enactment, created new equitable rights, and has prescribed the remedies for their enforcement, if the remedies so prescribed are substantially consistent with the ordinary procedure in equity in the

²¹ *Scott v. Armstrong*, 146 U. S. 499, 513 (36:1059); *Bagnell v. Broderick*, 13 Pet. 436 (10:235); *Johnson v. Christian*, 128 U. S. 374, 382 (32:412); *Foster v. Mora*, 98 U. S. 425, 428 (25:191); *Green v. Mezes*, 24 How. 268, 278 (16:661); *Robinson v. Campbell*, 3 Wheat. 207 (4:372); *Schofield v. Rhodes*, 22 C. C. A. 95, 97; *Davis v. Davis*, 18 C. C. A. 438, 440; *Hickey v. Stewart*, 3 How. 750, 771 (11:814); *Mezes v. Greer*, *McAll.* 405, *Fed. Cas.* 9,520; *Tutwiler v. Munford*, 73 Ala. 311; *Lerma v. Stevenson*, 43 Fed. R. 359; *Sanders v. McDonald*, 63 Md.

508; *Watkins v. Holman*, 16 Pet. 25, 64 (10:873); *Burnes v. Scott*, 117 U. S. 582, 591 (29:991); *Bank v. Crine*, 33 Fed. R. 811; *Seymour v. Lumber Co.*, 58 Fed. R. 962; *Singleton v. Touchard*, 1 Black, 342, 345 (17:50); *Bouldin v. Phelps*, 30 Fed. R. 561; *Jones v. McMaster*, 20 How. 210 (15:805); *Montijo v. Owen*, 14 Blatchf. 325, *Fed. Cas.* 9,722.

²² *Burnes v. Scott*, 117 U. S. 582, 591 (29:991).

²³ *Scott v. Armstrong*, 146 U. S. 499, 513 (36:1059); *Church v. Spiegelburg*, 31 Fed. R. 601; *Snyder v. Pharo*, 25 Fed. R. 400.

federal courts, no reason exists why such new equitable rights should not be enforced in the same form as they are in the state courts;²⁴ with this limitation, however, that such enforcement of the new equitable right does not impair any right conferred or conflict with any inhibition imposed by the constitution of the United States, nor contravenes the rule which maintains the distinction between law and equity, and requires legal and equitable remedies to be separately pursued, and forbids the blending of legal and equitable claims.²⁵ It has been determined that the federal courts will not enforce a state statute, which gives to a simple contract creditor the right to file a bill in equity to collect his debt and at the same time to set aside a fraudulent conveyance and decree a sale of the property so conveyed to pay the debt; the *ratio decidendi* being that the debtor has a constitutional right to a trial by a jury in a court of law to ascertain the validity and amount of the debt claimed, and that a court of equity will not interfere to aid the enforcement of a remedy at law for the collection of a debt, unless there be an acknowledged debt, or one established by a judgment already rendered, and, in addition thereto, there must be an interest in or lien upon the property, created by contract or by some distinct legal proceeding, which secures to the creditor the right to have it specifically appropriated to the payment of his debt.²⁶

²⁴ Clark v. Smith, 13 Pet. 195 (10:123); Holland v. Challen, 110 U. S. 15 (28:52); Wickliffe v. Owings, 17 How. 51 (15:46); Harmer v. Gwynne, 5 McLean, 317, Fed. Cas. 6,075; Broderick's Will, 21 Wall. 503 (22:599).

²⁵ Scott v. Neely, 140 U. S. 106, 117 (35:358); Cates v. Allen, 149 U. S. 451, 465 (37:804); Whitehead v. Shattuck, 138 U. S. 146 (34:873).

²⁶ Scott v. Neely, 140 U. S. 106, 117 (35:358); Cates v. Allen, 149 U. S. 451, 465 (37:804); Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 387 (37:1113); Trust Co. v. Railway Co., 82 Fed. R. 661; Harriscan v. Loan & Trust Co., 94 Fed. R. 729; Kittel v. Rail-

way Co., 65 Fed. R. 862; Brown v. Farwell Co., 74 Fed. R. 765.

"The principle that a general creditor cannot assail as fraudulent against creditors, an assignment or transfer of property made by his debtor until the creditor has first established his debt by the judgment of a court of competent jurisdiction, and has either acquired a lien upon the property, or is in a situation to perfect a lien thereon and subject it to the payment of his judgment, upon the removal of the obstacle presented by the fraudulent assignment or transfer, is elementary. * * * The existence of judgment, or of judgment and execution, is necessary, first, as ad-

§ 850. **Same—Whether a case is one of common law or equitable cognizance determined by its essential character.**—It is a settled rule in the federal courts, that whenever a new right is granted by a state statute, or a new remedy for a violation of an old right, or whenever such rights and remedies are dependent on state statutes or acts of congress, the jurisdiction of such case, as between the law side and the equity side of the federal courts, must be determined by the essential character of the case, and unless it comes within some of the recognized heads of equitable jurisdiction, it must be held to belong to the law side of the court.²⁷

§ 851. **A federal court sitting in equity has no jurisdiction of the common-law action of assumpsit.**—A circuit court of the United States, sitting in equity, in the state of Ohio, whose code of civil procedure requires all suits to be prosecuted in the name of the real party in interest, and abolishes all distinctions, in form, between actions at law and suits in equity, has no jurisdiction of a common-law action of assumpsit, based upon the non-payment of three drafts, drawn by agreement of parties by the plaintiff upon the defendant, in favor of a third person for convenience in collection, to pay a debt due by the defendant to the plaintiff, upon open account, and protested for non-payment, although the drafts were not endorsed nor in any manner assigned in writing by the payee to the plaintiff in the action. In such a case, the statute of Ohio invests the plaintiff with the right to sue in his own name, and the consequent right to introduce evidence to prove his legal title to the subject and cause of action, and there is no ground for resorting to a court of equity.²⁸

§ 852. **Legal defenses to purely legal demands cannot be availed of by bill in equity.**—The constitutional right of a party who has a purely legal demand, to have the validity and amount of the demand, so far as they depend upon facts, passed upon by a jury, cannot be defeated by his adversary by resorting to a court of equity for the purpose of setting up a defense

judicating and definitely establishing the legal demand, and, second, as exhausting the legal remedy." *Cates v. Allen*, supra.

²⁷ *Van Norden v. Morton*, 99 U. S. 378, 382 (25:453); *Alderson v.*

Dole, 74 Fed. R. 30; *Cherokee Nation v. Southern Kansas R. Co.*, 33 Fed. R. 914.

²⁸ *Thompson v. Ohio R. Co.*, 6 Wall. 134, 139 (18:765).

which is available at law. Where a party has a good defense at law to a purely legal demand, he should be left to that means of defense, and cannot withdraw the controversy from a court of law into a court of equity, unless he can allege and prove some special circumstances showing that he will suffer irreparable injury if denied relief in equity.²⁹

§ 853. **Same—Bill in equity will not lie to cancel life insurance policy for fraud, after death of cestui que vie.**—Fraud is cognizable in a court of law, as well as in a court of equity, and where it is claimed that an instrument which is made the basis of an action at law is inoperative on account of fraud in procuring its execution, the fraud may be set up at law as a defense to the action,³⁰ and the issues of facts involved in the charge of fraud submitted to the jury.³¹ By the death of the *cestui que vie* in a policy of life insurance, the obligation of the insurance company to pay the amount of the policy, as therein stipulated and expressed, becomes a purely legal demand, fixed and absolute, subject only to the condition of giving the notice and furnishing proof of death, as stipulated; and if, in such a case, the insurance company sets up the contention that the policy of insurance was obtained by a fraudulent misrepresentation of the facts, or a fraudulent suppression of the facts, and for that reason the policy is inoperative and the company not liable on it, such fraud will be a good defense at law, and may be set up by plea to an action at law upon the policy, and a court of equity has no jurisdiction of a bill in equity, praying a cancel-

²⁹ *Grand Chute v. Winegar*, 15 Wall. 373, 377 (21:174); *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616, 623 (20:501); *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 310 (48:188); *Deweese v. Reinhard*, 165 U. S. 386, 394 (41:757); *New York Life Ins. Co. v. Bangs*, 103 U. S. 780, 783 (26:608); *Grindrat v. Dane*, 4 Cliff. 263, Fed. Cas. 5,455; *San Diego Flume Co. v. Souther*, 90 Fed. R. 167; *Insurance Co. v. Kamper*, 73 Ala. 347; *Payson v. Lamson*, 134 Mass. 598; *Home Ins. Co. v. Stanchfield*, 1

Dill. 424, Fed. Cas. 6,660; *Ætna Life Ins. Co. v. Smith*, 73 Fed. R. 318.

³⁰ *Gregg v. Sayer*, 8 Pet. 244 (8:932); *Sweayze v. Burke*, 12 Pet. 11 (9:980); *Grand Chute v. Winegar*, 15 Wall. 373, 377 (21:174); *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616, 623 (20:501); *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 310 (48:188).

³¹ *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S. 401, 416 (43:492).

lation of the policy upon the ground of the alleged fraud in obtaining it.³²

§ 854. **Same—Action at law on municipal bonds not enjoined on ground of fraud.**—An action of debt at law upon municipal bonds cannot be enjoined in equity upon the allegation that such bonds were issued without authority and in fraudulent violation of law and the duty of the city officials having the subject in charge, and the transfer of the bonds to the plaintiff was merely colorable and without consideration and with notice of the fraud; because the facts alleged constitute a perfect and complete defense to the action at law, and may be interposed in that suit, and a judgment at law in favor of the defendant would be as conclusive against the validity of the bonds, and would as effectually expose the fraud, and prevent future deception and vexatious litigation, as would a decree in equity enjoining the action at law and cancelling the bonds.³³

§ 855. **Same—Action of ejectment not enjoined upon the ground that plaintiff's muniments of title are void.**—Patents and other muniments of title to land which are void may be collaterally attacked even in a court of law;³⁴ and a defendant in ejectment cannot maintain a bill in equity to enjoin the prosecution of the suit at law and to cancel the plaintiff's claim as a cloud upon his title, upon the ground that the patent or other muniment of title of the plaintiff, while apparently conveying the legal title, is, in fact, void; because if plaintiff's apparent legal title be in fact void, that is a perfect and complete defense to the action of ejectment, and to sustain the suit in equity would be a denial to the plaintiff at law of his constitutional right of trial by jury.³⁵

³² *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616, 623 (20:501); *Cable v. United States Life Ins. Co.*, 191 U. S. 288, 310 (48:188); *Home Ins. Co. v. Stanchfield*, 1 Dill. 424, Fed. Cas. 6,660; *Ætna Life Ins. Co. v. Smith*, 73 Fed. R. 318.

³³ *Grand Chute v. Winegar*, 15 Wall. 373, 377 (21:174).

³⁴ *Smelting Co. v. Kemp*, 104 U. S. 641 (26:876); *Polk's Lessees v. Wendal*, 9 Cranch, 87, 99 (3:

665); *Easton v. Salisbury*, 21 How. 426 (16:181); *Reichert v. Felps*, 6 Wall. 160 (18:849); *Best v. Polk*, 18 Wall. 112 (21:805); *New Orleans v. United States*, 10 Pet. 663 (9:573); *Rice v. Minn. & N. W. R. R. Co.*, 1 Black, 358, 386 (17:147); *Patterson v. Winn*, 11 Wheat. 380 (6:500); *Stoddard v. Chambers*, 2 How. 284 (11:181).

³⁵ *Deweese v. Reinhard*, 165 U. S. 386, 394 (41:757).

(b) SUITS TO RECOVER LAND.

§ 856. **Federal courts have no jurisdiction of suits in equity to recover land.**—It is a fundamental rule of federal jurisprudence, bottomed on the constitution, that suits in equity shall not be sustained in any of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law, and in cases arising upon a legal cause of action the plaintiff is entitled to a trial of all issues of fact by a jury; and this rule has been adhered to with great strictness in actions or suits for the recovery of land. If the owner of land holds the legal title and is out of possession, and an adverse claimant is in possession, and he desires to recover it, he must proceed in a court of law and in accordance with the forms of procedure in legal actions.³⁶

If a bill be filed in equity to recover land, and the title of the plaintiff is legal, and the evidence to support it appears from documents accessible to him, and no particular circumstances exist requiring the interference of a court of equity to prevent a multiplicity of suits or other vexation, or to prevent some injustice irremediable at law, the court will decline to entertain the bill and leave the party to his remedy at law, although the jurisdictional objection be not raised by the defendant in his pleadings, nor suggested by counsel in his argument.³⁷

§ 857. **Same—Ejectment bill not aided by prayer for an accounting.**—When a party has a right to the possession of land which he can enforce in an action at law, his right to the rents and profits of the land while in possession of the defendant is also a legal right, and must be enforced in the same jurisdiction; and the fatal defect of an ejectment bill which seeks to recover land upon a legal title cannot be cured by incorporating in it a prayer for an accounting of the rents and profits; and it is said that no instances exist where a person who had been successful at law in an action of ejectment has been allowed to file a bill for an account of rents and profits during the tortious posses-

³⁶ *Whitehead v. Shattuck*, 138 U. S. 146, 156 (34:873); *Killian v. Ebbinghaus*, 110 U. S. 568, 574 (28:246); *Lacassagne v. Chapins*, 144 U. S. 119, 126 (36:368); *Lewis v. Cocks*, 23 Wall. 466, 471 (23:70).

³⁷ *Hipp v. Babin*, 19 How. 271, 277 (15:633); *Smyth v. New Orleans Canal & Banking Co.*, 141 U. S. 656, 674 (35:891); *Lewis v. Cocks*, 23 Wall. 466, 471 (23:70).

sion held against him, or in which the complexity of the account has afforded a motive for the interposition of a court of chancery to decide the title and to adjust the account.³⁸

§ 858. **Same—Ejectment bill cannot be maintained upon an equitable title.**—To give a court of equity jurisdiction, the nature of the relief must be equitable, even when the suit is based on an equitable title. And a bill in equity which avers that the plaintiff has an equitable estate in fee in certain lands and that the defendants are in possession without title, and does not allege that they obtained possession under any person who had the legal title, and states no facts to connect the defendants with his equity, and prays that the defendants be turned out of, and that the plaintiff may be put in possession of the premises, is only an ejectment bill based on an equitable title, seeking legal relief, or such as a court of law only can give, and is not maintainable. As such a bill asserts no equity against the defendants, they have a right to stand upon their possession until compelled to yield to the legal title, and to demand a trial by jury of the question whether the plaintiff has the legal title, and the defendant cannot be deprived of that right by the failure of the plaintiff to acquire the legal title.³⁹

§ 859. **The legal title necessary to maintain the action of ejectment.**—By the rule of the common law, in all cases, in the action of ejectment the plaintiff must prove a legal title in himself to the premises at the time of the demise laid in the declaration, and his legal title must continue till the trial, and evidence of an equitable title is inadmissible to sustain the action;⁴⁰ and this rule of the common law is rigidly enforced in the courts of the United States in all actions for the recovery of the title and possession of land, whether such action be in the common-law form, or in the statutory forms established by the legislation of the various states.⁴¹

³⁸ *Hipp v. Babin*, 19 How. 271, 279 (15:633), citing *Dormer v. Fortescue*, 3 Atk. 124; *Barnwell v. Barnwell*, 3 Rldgw. P. C. 24.

³⁹ *Fussell v. Gregg*, 113 U. S. 550, 565 (28:993); *Galt v. Galloway*, 4 Pet. 332 (7:876); *Young v. Porter*, 3 Woods, 342.

⁴⁰ *Goodtitle v. Jones*, 7 T. R. 49; *Doe v. Wroot*, 5 East, 132; *Roe*

v. Reade, 8 T. R. 118; *Jackson v. Sisson*, 2 Johns. Cas. 321 (1:530); *Jackson v. Deyo*, 3 Johns. 422 (3:655); *Heard v. Baird*, 40 Miss. 793; *Torrance v. Betsy*, 1 George (Miss.) 129; *Thompson v. Wheatley*, 5 Smedes & Mar. (Miss.) 499; *Moody v. Farr*, 4 George (Miss.)

192

⁴¹ *Fenn v. Holme*, 21 How. 481,

§ 860. Same—No exception to the rule at common law—Lord Mansfield's doctrine based upon the presumption that the legal estate had been conveyed to the equitable owner.—At common law, an action of ejectment could not be maintained upon an equitable title, however complete it might be; there was no exception to the rule. It has been supposed that Lord Mansfield, while presiding in the court of King's Bench, by the application of equitable principles upon the trial of this common-law action, modified the common-law rule and engrafted exceptions upon it, allowing the action in a class of cases, to be prosecuted or defended upon equitable titles.⁴² But Lord Mansfield's doctrine, as it is called, has been misunderstood. In one case, he declared "that he and many of the judges had resolved never to suffer a plaintiff in ejectment to be non-suited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee, but that he would direct the jury to presume it surrendered."⁴³ This case, and the doctrine established upon it by subsequent cases, is based upon the presumption that, where trustees ought to convey to the beneficial owner, they have conveyed accordingly; or where the beneficial occupation of an estate by the possessor under an equitable title induces a probability that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be directed to presume a conveyance of the legal estate.⁴⁴ Instead of allowing a recovery upon an equitable title, the whole doctrine is based upon the presumption that the legal title has

488 (16:198); *Hooper v. Scheimer*, 23 How. 235, 249 (16:452); *Shierburn v. de Cordova*, 24 How. 423, 426 (16:741); *Langdon v. Sherwood*, 124 U. S. 74, 85 (31:344); *Redfield v. Parks*, 132 U. S. 239, 252 (33:327); *Johnson v. Christian*, 128 U. S. 374 (32:412); *Carter v. Ruddy*, 166 U. S. 493 (41:1090); *Richardson v. L. & N. R. Co.*, 169 U. S. 128 (42:687); *Kircher v. Murray*, 60 Fed. R. 52; *Lockhart v. Johnson*, 181 U. S. 516, 530 (45:979); *Foster v. Mora*, 98 U. S. 425, 428 (25:191).

⁴² Bull N. P. 110; *Doe v. Pegge*, 1 T. R. 758 n.; *Keech v. Hall*, 21,

23 n.; *Weakley v. Bucknell*, Cowp. 473.

⁴³ *Lade v. Holford*, Bull N. P. 110.

⁴⁴ *England v. Slade*, 4 T. R. 682; *Doe v. Wright*, 2 B. & A. 710; *Doe v. Hilder*, 2 B. & A. 782; *Doe v. Staple*, 2 T. R. 684; *Roe v. Reade*, 8 T. R. 118, 122; *Doe v. Wroot*, 5 East, 138; *Doe v. Sybourn*, 7 T. R. 3; *Langley v. Sneyd*, 1 Sim. & Stu. 55; *Hillary v. Waller*, 12 Ves. 252; *Goodson v. Ellison*, 3 Russ. 588; *Augier v. Stannard*, 3 Myln. & K. 571; *Carteret v. Paschal*, 3 P. Wms. 198.

been conveyed to the equitable owner, and, instead of modifying the ancient common-law rule, confirms it. But where the facts of the case preclude such presumption, or if it appear in a special verdict, or a special case, that the legal estate is outstanding in another person, the party who is not clothed with the legal estate cannot prevail in a court of law.⁴⁵

§ 861. **Same—Same—Same—Fenn v. Holme.**⁴⁶—In this great and leading case, decided in 1858, the supreme court of the United States stated the common-law rule, requiring the plaintiff in ejectment to have the legal title in order to recover, in the following language: “That the plaintiff in ejectment must in all cases prove a legal title to the premises in himself, at the time of the demise laid in the declaration, and that evidence of an equitable estate will not be sufficient for a recovery, are principles so elementary and so familiar to the profession as to render unnecessary the citation of authority in support of them.”⁴⁷ And in support of the rule so stated, the court cited three leading English cases,⁴⁸ decided in the King’s Bench long after the decision⁴⁹ of Lord Mansfield which has been supposed to have applied equitable doctrines to actions of ejectment; and these English cases⁵⁰ cited by the supreme court fully support the rule as stated. Both Lord Chief Justices Kenyon and Ellenborough maintained the rule, without exception, that the action of ejectment can be neither maintained nor defended upon an equitable title;⁵¹ and this rule, it is held, is made binding upon the federal judiciary by the provisions of the federal constitution.⁵²

§ 862. **Same—Same—Same—Lord Mansfield’s doctrine followed in the federal courts.**—As shown in a previous section,⁵³ Lord Mansfield’s doctrine was not a modification of the common-law rule requiring the legal title to support the action of ejectment, but, insisting upon the integrity of the rule, allowed

⁴⁵ Goodtitle v. Jones, 7 T. R. 49; Roe v. Read, 8 T. R. 118, 122; Doe v. Wroot, 5 East, 138; Shannon v. Bradstreet, 1 Sch. & Lefr. 67 n.

⁴⁶ 21 How. 481, 488 (16:198).

⁴⁷ Fenn v. Holme, 21 How. 481, 488 (16:198).

⁴⁸ Goodtitle v. Jones, 7 T. R. 49; Doe v. Wroot, 5 East, 138; Roe v. Reade, 8 T. R. 118, 122.

⁴⁹ Lade v. Holford, Bull N. P. 110.

⁵⁰ Goodtitle v. Jones, 7 T. R. 49; Doe v. Wroot, 5 East, 138; Roe v. Reade, 8 T. R. 118, 122.

⁵¹ Goodtitle v. Jones 7 T. R. 49; Doe v. Wroot, 5 East, 138; Roe v. Reade, 118, 122.

⁵² Fenn v. Holme, 21 How. 481, 488 (16:198).

⁵³ Ante sec. 860.

the jury, in order to promote the ends of justice, in certain classes of cases, to presume that trustees, who had held the legal title to the estate, had conveyed it to the beneficial owner, and to allow such owner to recover in ejectment upon the legal title so presumed to have been vested in him. The doctrine was applied in England in two classes of cases, viz.: (1) Where trustees ought to have conveyed, the jury were directed to presume that they had performed their duty, and had accordingly conveyed the legal estate to the beneficial owner; and (2) where the possession of the estate by the equitable owner was such as to induce a probability that the legal title had been conveyed to him, the jury were directed that they might presume a conveyance of the legal estate to him.⁵⁴

Following this doctrine, the supreme court has held that, when the objects of a conveyance in trust had wholly failed, and it was impossible to perform the trust, it became the duty of the trustees to reconvey to their grantor, and that a court of equity, if applied to, could not hesitate to compel a reconveyance, and that under the circumstances stated such a reconveyance will be presumed in equity and at law as well; and it was accordingly held that the beneficial owner was entitled to recover in an action of ejectment, land so presumed to have been reconveyed to him by his trustees. In deciding the case, the court stated the conditions upon which the reconveyance will be presumed as follows: "Three things must appear to warrant the presumption: (1) It must have been the duty of the trustee to convey. (2) There must be sufficient reason for the presumption. (3) The object of the presumption must be the support of a just title. The case must be clearly such that a court of equity, if called upon, would decree a reconveyance."⁵⁵ The presumption in such cases is not a conclusive one, but is open for rebuttal by proof, and

⁵⁴ *Lade v. Holford*, Bull N. P. 110; *England v. Slade*, 4 T. R. 682; *Doe v. Wrighte*, 2 B. & A. 710; *Doe v. Hilder*, 2 B. & A. 782; *Doe v. Staple*, 2 T. R. 3; *Goodtitle v. Jones*, 7 T. R. 49; *Roe v. Reade*, 8 T. R. 118, 122; *Doe v. Wroot*, 5 East, 138; *Hillary v. Waller*, 12 Ves. 252; *Doe v. Sybourn*, 7 T. R. 3; *Langley v. Snyed*, 1 Sim. & Stu.

55; *Goodson v. Ellison*, 3 Russ. 588; *Augler v. Stannard*, 3 Myln. & K. 571; *Carteret v. Paschal*, 3 P. Wms. 198.

⁵⁵ *French v. Edwards*, 21 Wall. 147, 151 (22:534), citing *Lade v. Holford* and *England v. Slade*, *supra*; *French v. Edwards*, 5 Sawy. 269, Fed. Cas. 5,098.

if it be found as a fact upon the trial that the legal title is still in the trustees the beneficiary cannot recover in ejectment.⁵⁶

§ 863. **Patents issued by the United States are conclusive evidence of the legal title.**—Congress is invested with the sole and exclusive power to declare the dignity and legal effect of land titles emanating from the United States government; and federal legislation in reference to the public lands has established and declared the fundamental and universal rule to be, that a patent, when duly and lawfully issued, is the superior and conclusive evidence of the legal title, and until its issuance the legal title in fee remains in the government, which, by the patent, when issued, passes to the grantee, and he is entitled to recover the possession in ejectment.⁵⁷ In the courts of the United States, where the distinction between legal and equitable proceedings is strictly maintained, and legal and equitable remedies are separately pursued, the action of ejectment can be sustained only upon the possession by the plaintiff of the legal title; and equitable rights and titles, however clear and complete, must be enforced by separate and distinct equitable proceedings. The patent is the government's conveyance, and is the instrument which, under the laws of congress, passes to the grantee the title of the United States; and if other parties have acquired equities in the land superior to those of the patentee, upon which the patent issued, a court of equity will, upon a proper bill filed and duly prosecuted, enforce such equities by compelling a transfer of the legal title, or enjoining its enforcement, or by cancelling the patent. But in the action of ejectment in the federal courts, the legal title must prevail, and the patent, when regular on its face, is in a court of law conclusive of that title. And, inasmuch as the federal constitution, which is the supreme law of the land, binding upon "the judges in every state," vests in congress the power to dispose of the public domain, and make all needful rules and regulations respecting the same, including the absolute right to prescribe the times, the conditions and the modes of transferring the public lands, it follows that, whenever, in an action of eject-

⁵⁶ *Lincoln v. French*, 105 U. S. 614, 618 (26:1189); *Goodtitle v. Jones*, 7 T. R. 43; *Roe v. Reade*, 8 T. R. 118, 122.

⁵⁷ *Bagnell v. Broderick*, 13 Pet. 436 (10:235); *Singleton v. Touchard*, 1 Black, 342 (17:50).

ment, in the state courts, the question presented is, whether the plaintiff or the defendant has the superior legal title from the United States, the patent must prevail; and if the state courts refuse to give to the patent its due and legal effect, as declared by congress, a federal question is presented, which will authorize a writ of error from the supreme court of the United States to review and reverse the judgment of the state court.⁵⁸

§ 864. Same—Jurisdiction of the land department.—The settled doctrine of the supreme court is that, so long as the legal title to the public lands remains in the United States, and the proceedings for acquiring that title are yet *in fieri*, inquiry as to all equitable rights arising upon applications for the issuance of patents, and inquiry into the extent and validity of rights claimed against the government in respect to such lands, come within the cognizance of the land department, and the courts will not interfere by mandamus, injunction, or otherwise, to control the exercise of the power vested in that tribunal.⁵⁹

§ 865. Patents necessary to convey legal title under Swamp Land Act of 1850.—The Swamp Land Act ⁶⁰ of Sept. 28, 1850, operated as a grant *in presenti* to the states then in existence, vesting in them an inchoate title to all the swamp lands in their respective jurisdictions, and when such lands were afterwards identified by the secretary of the interior, as directed in the act, or any subsequent act of congress passed for that purpose, the title became perfect as of the date of the granting act, and the states were, upon such identification, entitled to patents vesting in them the legal title in fee simple, which title remained in the United States until the patents were actually issued; ⁶¹ and the

⁵⁸ Gibson v. Chouteau, 13 Wall. 92, 104 (20:534); Bagnell v. Broderick, 13 Pet. 436 (10:235); Wilcox v. Jackson, 13 Pet. 516 (10:264); Irvine v. Marshall, 20 How. 588 (15:994); Fenn v. Holme, 21 How. 481, 488 (16:198); Lindsey v. Miller, 6 Pet. 672 (8:538); Redfield v. Parks, 132 U. S. 239, 252 (33:327); Kircher v. Murray, 60 Fed. Rep. 52; Sanford v. Sanford, 139 U. S. 642, 651 (35:290).

⁵⁹ Brown v. Hitchcock, 173 U. S. 473, 479 (43:772); United States v. Schurz, 102 U. S. 378, 396 (26:

167); Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592 (42:591); Knight v. United Land Asso. 142 U. S. 161 (35:974).

⁶⁰ 9 U. S. Stat. at L. ch. 84, p. 519.

⁶¹ Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 604 (42:591); Rogers Locomotive Machine Works v. American Emigrant Co., 164 U. S. 559, 577 (41:552); Rice v. R. Co., 110 U. S. 695 (28:289); Brown v. Hitchcock, 173 U. S. 473, 479 (43:772); 6 Fed. Stat. Anno. 397-414.

necessity for the issuance of patents in order to vest the legal title in the states was not taken away by the confirmatory act of March, 1857,⁶² and without a patent issued to the state an action of ejectment cannot be maintained in the courts of the United States for lands claimed under the swamp land grant,⁶³ for under that act the legal title passes only on the delivery of the patent.⁶⁴

§ 866. **Exceptions to the rule requiring patent to convey the legal title to the public lands.**—There are some exceptions to the rule which requires a patent to pass the fee to public lands out of the United States. It is specially provided by statute that where lands have been or may be granted by any law of congress to any state or territory, and such law does not convey the fee-simple to the lands, nor require patents to be issued therefor, the list of such lands certified to the state or territory by the commissioner of the general land office under the seal of his office shall be regarded as a conveyance of the fee-simple title of all the lands embraced in the list that are of the character contemplated by the law of congress and intended to be thereby granted, but, as to lands not intended to be granted by the law of congress, the list is declared to be perfectly null and void, and no right, title, claim or interest shall be thereby conveyed.⁶⁵ Whenever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.⁶⁶ Where an act of congress makes a grant *in presenti*, or is in words of present grant, it is not necessary, unless specially directed, that a patent should issue.⁶⁷ A legislative confirmation by congress of a claim to land is a recognition of the validity of such claim, and is a conveyance of an estate or right therein to one who has the

⁶² Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 604 (42:591). (42:591); Brown v. Hitchcock, 173 U. S. 473, 479 (43:772).

⁶³ Brown v. Hitchcock, 173 U. S. 473, 479 (43:772); Rogers Locomotive Machine Works v. American Emigrant Co., 164 U. S. 559, 574 (41:552); Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 592 (42:591).

⁶⁴ Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 604

⁶⁵ U. S. Rev. Stat. Sec. 2449.

⁶⁶ Michigan Land & Lumber Co. v. Rust, 168 U. S. 589, 604 (42:591).

⁶⁷ Wisconsin C. R. Co. v. Price County, 133 U. S. 496 (33:687); St. Paul & P. R. Co. v. Northern P. R. Co., 139 U. S. 1 (35:77); Desert Salt Co. v. Tarpey, 142 U. S. 241-254 (35:999).

possession or some estate in it; and if the claim be to land with clearly defined boundaries, or is capable of identification, the legislative confirmation perfects the title to the particular tract, and a subsequent patent is only documentary evidence of the title. If the claim be to quantity, and not to a specific tract capable of identification, a segregation by survey will be required, and the confirmation will then immediately attach the title to the land segregated, and suit can be maintained upon the title by confirmation without the issue of a patent.⁶⁸

§ 867. **Void patents may be collaterally attacked.**—The rule that a patent for land issued by the United States is conclusive evidence of the legal title and not open to attack in an action of ejectment, is based upon the assumption that the officer who issued it had authority so to do, and has no application where it is shown that the land in controversy had, before the institution of the proceedings upon which the patent was issued, passed from the United States, and the previous transfer of the land is a fact which may be established in an action at law as well as in a suit in equity. Patents issued by the United States for lands which they have previously granted, or reserved from sale, or appropriated, are void. Patents may be collaterally attacked in any action, and their operation as a conveyance defeated, by showing that the land department had no jurisdiction to dispose of the land attempted to be granted by them. If a patent be absolutely void on its face, or the issuing thereof was without authority, or was prohibited by statute, or the government or state had no title to the land sought to be granted, it may be impeached collaterally in a court of law in an action of ejectment.⁶⁹

⁶⁸ *Langdeau v. Hanes*, 21 Wall. 521, 531 (22:606); *Morrow v. Whitney*, 95 U. S. 555 (24:457); *S. C.* 112 U. S. 695 (28:872); *Wright v. Roseberry*, 121 U. S. 499 (30:1041); *St. Paul & Pacific R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1-19 (35:77); *Desert Salt Co. v. Tarpey*, 142 U. S. 241-254 (35:999); *Shaw v. Kellogg*, 170 U. S. 341 (42:1060); *Stoddard v. Chambers*, 2 How. 284 (11:269); *Les Bois v. Bramell*, 4 How. 449 (11:1051); *Bissell v. Penrose*, 8

How. 317 (12:1095); *McCall v. Carpenter*, 18 How. 297 (15:389).

⁶⁹ *Knight v. United Land Association*, 142 U. S. 161, 216 (35:974); *St. L. Smelt. & Ref. Co. v. Kemp*, 104 U. S. 636 (26:876); *Polk v. Wendal*, 9 Cranch, 87, 99 (3:665); *Easton v. Salisbury*, 21 How. 426 (16:181); *Reichert v. Felps*, 6 Wall. 160 (18:849); *Best v. Polk*, 18 Wall. 112 (21:805); *New Orleans v. United States*, 10 Pet. 663 (9:573); *Stoddard v. Chambers*, 2 How. 284 (11:269); *Patterson v.*

§ 868. **Ejectment not maintainable on certificates of registers and receivers of the government land offices—Statutes of Arkansas and Nebraska.**—Certificates of the location and purchase of the public lands of the United States, acknowledging receipt of the purchase money, issued by the registers and receivers of the government land offices, do not convey the legal title of the land to the holders of the certificates, but are only evidence of an equitable title, which may afterwards be perfected into a legal title by the issuance of a patent; and, in the courts of the United States, such certificates are not sufficient evidence of title to authorize a recovery in an action of ejectment, nor to defeat a recovery by one who has a patent from the government, although such certificates are, by the statute of the state where the federal court is held, declared to be evidence sufficient to authorize a recovery.⁷⁰ The states of Arkansas⁷¹ and Nebraska⁷² have by statute declared such certificates sufficient evidence to maintain ejectment, but the federal courts have refused to enforce those statutes.

§ 869. **Mississippi statute declaring that land-office certificates shall vest full legal title—Not binding on federal courts.**—The state of Mississippi—a state which has always preserved in her jurisprudence the distinction between law and equity, and in whose courts the distinction between legal and equitable proceedings has been maintained, and legal and equitable remedies separately pursued—has from a very early day to the present time maintained in force a statute providing that:

“All certificates issued in pursuance of any act of congress by any board of commissioners, register of any land-office, or any other person authorized to issue such certificate, founded on any warrant, order of survey, entry, grant, confirmation, donation, pre-emption, or purchase from the United States of any

Winn, 11 Wheat. 380 (6:500);
Rice v. Minn. & N. W. R. R. Co., 1
Black, 358, 386 (17:147); Steel v.
St. L. Smelt. & Ref. Co., 106 U. S.
447, 453 (27:226); Wright v. Rose-
berry, 121 U. S. 488, 519 (30:1039);
Doolan v. Carr, 125 U. S. 618, 625
(31:844).

⁷⁰ Hooper v. Scheimer, 23 How.
235, 249 (16:452); Redfield v.

Parks, 132 U. S. 239, 252 (33:327);
Langdon v. Sherwood, 124 U. S. 74,
85 (31:344); Carter v. Ruddy, 166
U. S. 493, 501 (41:1090).

⁷¹ Hooper v. Scheimer, 23 How.
235, 249 (16:452); Redfield v.
Parks, 132 U. S. 239, 252 (33:327).

⁷² Langdon v. Sherwood, 124 U.
S. 74, 85 (31:344).

land in this state, shall vest the full legal title to such land in the person to whom such certificate is granted, his heirs or assigns, so far as to enable the holder thereof to maintain an action thereon, and the same shall be received in evidence as such, saving the paramount rights of other persons.”⁷³

It has been held by the supreme court of Mississippi, that, notwithstanding this statute, the certificates therein mentioned vest in purchasers an equitable title only, the legal fee-simple title remaining in the government until the issuance of a patent, and that a patent subsequently issued must prevail at law over the certificate, though a court of equity will give preference to the prior certificate of entry; the *ratio decidendi* being that it is not within the legal competency of the state to prescribe the mode in which the United States shall part with their legal title.⁷⁴

We have been unable to find any decision of the supreme court of the United States passing upon this identical statute, but statutes of other states of the same import and legal effect have been before that court a number of times, and, according to the rule which has been firmly established by those and other decisions, the kind and character of documentary evidence described in the Mississippi statute is inadmissible in a federal court to sustain an action of ejectment, for the reason that such certificates, in the absence of a special act of congress, convey at best an equitable title only.⁷⁵

§ 870. Ejectment not maintainable in the federal courts sitting in California on certificates of land purchase issued by that state.—According to the state land system existing in the state of California, the state can be divested of the legal title of its lands only by the issuance of a patent to the purchaser or purchasers;^{75a} however, certificates of purchase issued by the state to purchasers of its public lands are, by state statute,

⁷³ Hutch. Code (Miss.) 859; Rev. Code of Miss. 1857, chap. LXI, Art. 229, p. 517; Rev. Code of Miss. 1871, Sec. 808; Rev. Code of Miss. 1880, Sec. 1623; Annotated Code of Miss. 1892, Sec. 1782.

⁷⁴ Sweatt v. Corcoran, 8 George (Miss.) 513; Hester v. Kembrough, 12 Smedes & M. (Miss.) 659; Dixon v. Porter, 1 Cush. (Miss.) 84; Dick-

inson v. Brown, 9 Smedes & M. (Miss.) 130.

⁷⁵ Hooper v. Scheimer, 23 How. 235, 249 (16:452); Redfield v. Parks, 132 U. S. 239, 252 (33:327); Langdon v. Sherwood, 124 U. S. 74, 85 (31:344); Fenn v. Holme, 21 How. 481, 488 (16:198); Bagnell v. Broderick, 13 Pet. 436 (10:235).

^{75a} Manly v. Howlett, 55 Cal. 97.

made *prima facie* evidence of legal title in the holders thereof, and sufficient to maintain an action of ejectment in the state courts;⁷⁶ but, as such certificates of purchase under the laws of the state convey, in strictness, an equitable title only, they are insufficient to support an action of ejectment in the federal court.⁷⁷

§ 871. Ejectment not maintainable in the federal courts on land certificates, location and survey issued and made under the laws of Texas.—The state of Texas has a vast and valuable public domain, and a well-constructed land system, an essential and fundamental principle of which is that, the legal title of the state to its public lands can be divested only by the issuance of a patent to the purchaser or purchasers, their heirs and assigns. Until the patent issues the legal estate in fee remains in the state, but is divested upon the execution and delivery of the patent.⁷⁸ In that state, the action for the recovery of land is “Trespass to try title,” and under the statute providing the remedy the action is broad and effective enough in its scope to embrace all litigation affecting the title to real estate, whether legal or equitable.⁷⁹ In the judicial system of that state, the distinction between legal and equitable remedies has no existence, and trespass to try title may be maintained in the state courts upon either a legal or an equitable title, and this has been the rule from the earliest history of the state.⁸⁰ It is provided by statute that: “All certificates of headright, land scrip, bounty warrants, or any other evidence of right to land recognized by the laws of this state, which have been located and sur-

⁷⁶ Richter v. Riley, 22 Cal. 639; Wright v. Roseberry, 81 Cal. 88, 22 Pac. 336; Wright v. Roseberry, 121 U. S. 488, 521 (30:1039).

⁷⁷ Sweatt v. Burton, 42 Fed. R. 286.

⁷⁸ McLeary v. Dawson, 87 Texas, 535; Todd v. Elsher, 26 Texas, 239; Bryan v. Shirley, 53 Texas, 459; Wood v. Durrett, 28 Texas, 438; Barroum v. Culmell, 90 Texas, 93; Miller v. Gist, 91 Texas, 335; Duren v. H. & T. C. Ry. Co., 86 Texas, 287.

⁷⁹ Hardy v. Beaty, 84 Texas, 568, 31 Am. St. R. 80, 19 S. W. R. 778.

⁸⁰ Neil v. Kees, 5 Texas, 24; Easterling v. Blythe, 7 Texas, 212; Miller v. Alexander, 8 Texas, 41; Wright v. Thompson, 14 Texas, 559; Martin v. Parker, 26 Texas, 259; Walker v. Howard, 34 Texas, 508; Titus v. Johnson, 50 Texas, 237; Burdett v. Haley, 51 Texas, 543; Thurber v. Conners, 57 Texas, 96; Hill v. Moore, 62 Texas, 612; Sheppard v. Cummings, 44 Texas, 502; Peterson v. Fowler, 73 Texas, 525; State v. Snyder, 66 Texas, 694; Grimes v. Hobson, 46 Texas, 419; Hardy v. Beaty, 84 Texas, 568.

veyed, shall be deemed and held as sufficient title to authorize the maintenance of an action of trespass to try title.”⁸¹ But, under the laws of the state, such certificate, location and survey vest in the claimant or owner an equitable title only, the legal estate remaining in the state,⁸² and will not support an action of trespass to try title in the federal courts sitting in the state of Texas.⁸³

§ 872. Ejectment maintained in the federal courts in Pennsylvania on warrant and survey.—It is the peculiar province of the states to determine the requisite formalities for passing the legal title to its own public lands, or other lands after they have passed out of the national government and have been vested in the state or in individuals or corporations, and the federal courts will recognize and enforce all municipal laws and regulations which determine the manner in which the legal and equitable estate in lands shall be transferred;⁸⁴ and as, under the peculiar land system of the state of Pennsylvania, a warrant and survey, and payment of the purchase money, of land purchased from the state, vest in the purchaser a legal estate, without the issuance of a patent by the commonwealth, an action of ejectment can be maintained in the federal courts in that state upon such warrant, survey and evidence of payment, without a patent, and the action may be maintained by the owner who paid the purchase money, although the application was made and the warrant issued in the name of another who has made no transfer to the owner or claimant.⁸⁵

⁸¹ Texas Rev. Stat. (1895) Art. 5259.

⁸² *Duren v. H. & T. C. Ry. Co.*, 86 Texas, 287; *Barroum v. Culmell*, 90 Texas, 93; *Miller v. Gist*, 91 Texas, 335; *Shierburn v. De Cordova*, 24 How. 423, 426 (16:471).

⁸³ *Shierburn v. De Cordova*, 24 How. 423, 426 (16:471).

⁸⁴ *Langdon v. Sherwood*, 124 U. S. 74, 85 (31:344); *United States v. Crosby*, 7 Cranch, 115 (3:287); *Clark v. Graham*, 6 Wheat. 577 (5:334); *McCormick v. Sullivant*, 10 Wheat. 192 (6:300); *United States v. Fox*, 94 U. S. 315 (24:192); *Brice v. Ins. Co.*, 96 U. S.

627 (24:858); *Ins. Co. v. Cushman*, 108 U. S. 51 (27:648); *Deck v. Whitman*, 96 Fed. R. 883.

⁸⁵ *Herron v. Dater*, 120 U. S. 464 (30:748); *Murphy v. Packer*, 152 U. S. 401 (38:491).

“The power of the state to regulate the tenure of real property within her limits, and the modes of its acquisition and transfer, and the rules of its descent, and the extent to which a testamentary disposition of it may be exercised by its owner is undoubted. It is an established principle of law everywhere recognized, arising from the necessity of the case, that the

§ 873. **Ejectment maintainable in the federal courts on prior possession.**—While it is an elementary rule that a plaintiff in ejectment must recover upon the strength of his own, and not on the weakness of the defendant's title, yet an actual prior possession under a claim of right, and not voluntarily abandoned, will satisfy the rule and enable the plaintiff to recover against a defendant who has entered without any lawful right, and is a mere intruder or trespasser. This is the rule of both the common law and the civil law, and is recognized and enforced in suits at law to recover land in the federal courts.⁸⁶ But the rule requires that the prior possession of the plaintiff must have been continuous, and has not been voluntarily abandoned, and that the action to regain possession must be instituted and prosecuted within a reasonable time after it has been lost. The rule is founded upon the presumption that every possession peaceably acquired is lawful, and is sustained by the policy of protecting the public peace against violence and disorder;

disposition of immoveable property, whether by deed, descent, or any other mode, is exclusively subject to the government within whose jurisdiction the property is situated. The power of the state in this respect follows from her sovereignty within her limits, as to all matters over which jurisdiction has not been expressly or by necessary implication transferred to the federal government. The title and modes of disposition of real property, whether *inter vivos* or testamentary, are not matters placed under the control of federal authority. Such control would be foreign to the purposes for which the federal government was created, and would seriously embarrass the landed interests of the state." Field, Justice, in *United States v. Fox*, 94 U. S. 315, 321 (24:192).

⁸⁶ *Christy v. Scott*, 14 How. 282 (14:422); *Sabariego v. Maverick*, 124 U. S. 261, 301 (31:430); *Haws v. Victoria Copper Mining Co.*, 160,

U. S. 303, 319 (40:436); *Burt v. Panjaud*, 99 U. S. 180, 182 (25:451); *Campbell v. Rankin*, 99 U. S. 261, 262 (25:435); *Atherton v. Fowler*, 96 U. S. 513 (24:732); *Belk v. Meagher*, 104 U. S. 279, 287 (26:735); *Gacler Mountain S. Min. Co. v. Willis*, 127 U. S. 471, 487 (32:172); *Mickey v. Stratton*, 5 Sawy. 479, Fed. Cas. 9,530; *Wilson v. Fine*, 14 Sawy. 35, 38 Fed. R. 790; *Van Auken v. Monroe*, 38 Mich. 730; *Jackson v. Boston & Worcester Railroad*, 1 Cush. 575; *Allen v. Rivington*, 2 Saund. 111; *Doe v. Read*, 8 East, 356; *Doe v. Dyball*, 1 Moody & M. 346; *Jackson v. Hazen*, 2 Johns. 438 (3:442); *Whitney v. Wright*, 15 Wend. 171 (12:825); *Smith v. Lorillard*, 10 Johns. 338 (4:1057); *Jackson v. Rightmyre*, 16 Johns. 314 (6:153); *Bradshaw v. Ashley*, 180 U. S. 59, 71 (45:423); *Wilson v. Fine*, 38 Fed. R. 789; *American Mortgage Co. v. Hopper*, 48 Fed. R. 47; *Wilson v. Palmer*, 18 Tex. 592, 595.

and, as it is intended to prevent and redress trespasses and wrong, the rule is limited to cases where the defendants are trespassers and wrongdoers, and does not extend to cases where the defendant has acquired the possession peaceably and in good faith, under color of title, and is always qualified in its application by the circumstances which constitute the origin of the adverse possession, and the character of the claim upon which it is defended.⁸⁷ The rule is based upon the most obvious conception of justice and good conscience, and proceeds upon the theory that a mere intruder and trespasser cannot make his wrongdoing successful by asserting a flaw in the title of the one against whom the wrong has been committed.⁸⁸ In the state of Texas, the rule is applied with great liberality in favor of the plaintiff, who relies for recovery upon his prior possession. It is there held that the prior possession of the plaintiff or those under whom he claims is *prima facie* evidence of title in him, sufficient to entitle him to recover, even in a case where the defendant enters without actual force under a claim of title, unless the defendant shows a good title.⁸⁹

§ 874. Ejectment maintained in the federal courts on legal title by estoppel.—When a person executes and delivers a deed with covenants of warranty of title, purporting to convey to another real estate which the grantor does not own, or by his deed assumes to convey a title and by any form of assurance obligates himself to protect his grantee in the enjoyment of the premises which the deed purports to convey, or sets forth on the face of the instrument by way of recital or averment, or affirms in the deed either expressly or by necessary implication, that he is seized in fee of the land, and afterwards acquires the title thereto, the legal title and estate so acquired passes by estoppel to his grantee;⁹⁰ and the grantee may maintain an action of

⁸⁷ *Sabariego v. Maverick*, 124 U. S. 261, 301 (31:430); *Jackson v. Rightmyre*, 16 Johns. 314 (6:153); *Smith v. Lorillard*, 10 Johns. 338 (4:1057); *Whitney v. Wright*, 15 Wend. 171 (12:825).

⁸⁸ *Haws v. Victoria Copper Mining Co.*, 160 U. S. 303, 319 (40:436).

⁸⁹ *Watkins v. Smith*, 91 Texas, 587; *House v. Reavis*, 89 Texas, 626.

⁹⁰ *Van Rensselaer v. Kearney*, 11 How. 297 (13:703); *Miller v. Texas & Pacific R. Co.*, 132 U. S. 662, 693 (33:487); *Stoddard v. Chambers*, 2 How. 284 (11:269); *Easton v. Salisbury*, 21 How. 426 (16:181); *Skidmore v. Ry. Co.*, 112 U. S. 33 (28:626); *Bush v. Marshall*, 6 How. 284 (12:440); *Ryan v. United States*, 136 U. S. 68 (34:447); *Moore v. Crawford*, 130 U. S.

ejectment in the federal courts on the legal title which passed to, and vested in him by estoppel.⁹¹

§ 875. **Plaintiff could not recover in ejectment at common law upon a title which did not subsist in him at the commencement of the action.**—It was an inflexible rule of the common law, that the plaintiff in ejectment must recover, if at all, upon a title which subsisted in him at the time of the commencement of the action, and evidence of any after-acquired title is wholly inadmissible. The title to the premises, as it existed at the commencement of the action is the question to be tried.⁹²

§ 876. **Equitable titles cannot be interposed as a defense to the action of ejectment.**—In the action of ejectment, the issue joined is upon the strict legal title only, and the rule of the federal judiciary, requiring legal and equitable remedies to be separately pursued, precludes the defendant in all cases from setting up in defense of the action an equitable title to the land in controversy; but, if the plaintiff establishes a legal title, the defendant, in order to successfully defend his possession, must prove a good and valid subsisting legal title in himself, superior in law to the title exhibited by the plaintiff, and upon which he, the defendant, could recover the possession, if he were out, and the plaintiff in possession.⁹³

122 (32:878) *Barroum v. Culmell*, 90 Texas, 93; *Miller v. Gist*, 91 Texas, 335; *Smith v. Williams*, 44 Mich. 240, 242; *Duffy v. White*, 115 Mich. 266, 73 N. W. 364.

⁹¹ *Stoddard v. Chambers*, 2 How. 284 (11:269); *Ryan v. United States*, 136 U. S. 68, 88 (34:447).

⁹² *Hollingsworth v. Flint*, 101 U. S. 591, 596 (25:1028); *Litchfield v. Railroad Co.*, 7 Wall. 270, 272 (19:150); *Johnson v. Jones*, 1 Black, 209, 227 (17:117); *McCool v. Smith*, 1 Black, 459, 471 (17:218); *Goodtitle v. Herbert*, 4 T. R. 680; *Wood v. Morton*, 11 Ill. 547; *Pitkin v. Yard*, 13 Ill. 250; *Benney v. Canal Co.*, 8 Pet. 218.

⁹³ *Bagnell v. Broderick*, 13 Pet. 436 (10:235); *Hickey v. Stewart*, 3 How. 750, 771 (11:814); *Robin-*

son v. Campbell, 3 Wheat. 207 (4:372); *Johnson v. Christian*, 128 U. S. 374, 382 (32:412); *Foster v. Mora*, 98 U. S. 425, 428 (25:191); *Green v. Mezes*, 24 How. 268, 278 (16:661); *Watkins v. Holman*, 16 Pet. 25, 64 (10:873); *Singleton v. Touchard*, 1 Black, 342, 345 (17:50); *Jones v. McMaster*, 20 How. 210 (15:805); *Schofield v. Rhodes*, 22 C. C. A. 95, 97; *Davis v. Davis*, 18 C. C. A. 438, 440; *Mezes v. Greer*, McAll. 405, Fed. Cas. 9,520; *Tutwiler v. Munford*, 73 Ala. 311; *Lerma v. Stevenson*, 43 Fed. R. 359; *Sanders v. McDonald*, 63 Ned. 508; *Bank v. Crine*, 33 Fed. R. 811; *Seymour v. Lumber Co.*, 58 Fed. R. 962; *Bouldin v. Phelps*, 30 Fed. R. 561; *Montijo v. Owen*, 14 Blatchf. 325, Fed. Cas. 9,722.

§ 877. **Same—Title-bond and purchase money paid.**—The defendant in an action of ejectment cannot defend his possession by showing that the plaintiff has executed and delivered to him a title-bond for the conveyance of the land, and the consideration has been paid; in such a case, the defendant's title is equitable only, and although his equity is complete, and a court of equity would compel the conveyance of the legal estate, yet he cannot make such title available in a court of law. There is no reason why a court of law should give effect to such a right, that would not equally apply to any other equitable right.⁹⁴

§ 878. **Same—Defendant not allowed to prove that patent was issued through mistake—Bagnell v. Broderick.**—In this case, which was an action of ejectment, the plaintiff deraigned title through a patent issued by the United States to one of his predecessors in title, and a regular succession of conveyances to himself, and the defendant introduced evidence tending to show that the patent was issued through mistake, and that he held a perfect equitable title; and upon writ of error to the supreme court it was held that the defendant could assert his equitable title only by a bill in equity, filed on the equity side of the court, and that such title could not be interposed as a defense to the action of ejectment.⁹⁵

§ 879. **Same—Defendant not allowed to prove elder patent was founded on junior entry—Robinson v. Campbell.**—This was an action of ejectment in which both parties claimed title under patents issued by the state of Virginia, the land in controversy having fallen in the state of Tennessee upon the settlement of the disputed boundary between those two states. The defendant offered to prove that plaintiff's elder patent was founded on a junior entry, and his own junior patent was founded on an elder entry, which, under the laws of Tennessee, where the case was tried, vested a superior legal title in the defendant. This evidence was excluded by the trial court, and judgment rendered for the plaintiff; and on writ of error the supreme court affirmed the judgment, holding that the validity and effect of the titles of the respective parties should be determined by the laws of Virginia, by whose authority they were

⁹⁴ *Watkins v. Holman*, 16 Pet. 25, 64 (10:873).

⁹⁵ *Bagnell v. Broderick*, 13 Pet. 436 (10:235).

granted, and that, by the laws of that state, the defendant's title, if any, was equitable, and proper for the cognizance of a court of equity only, and not admissible in an action at law.⁹⁶

§ 880. Same—Defendant not allowed to show fraudulent survey.—In a legal action, in the circuit court of the United States, for the possession of land granted, located, and surveyed by an antecedent government, the defendant will not be allowed to show in defense that, by the fraudulent procurement of the grantee, the survey was made to embrace a large area of land not authorized by law; and where, in an action of trespass to try title in the state of Texas, the plaintiff established a legal title by virtue of a grant emanating from the government of the Republic of Mexico, and a location and survey thereunder, while the state of Texas was a part of that republic, the defendant was not permitted in defense of that action to go behind the location and survey and attack them for fraud and show that they embraced an area of land which, according to the law under which they were made, they should not have embraced. It was held that if the location and survey were voidable for irregularity or any other cause, the question was not one for a court of law in an action to recover possession, but one for a court of equity upon a bill brought to reform, and to correct error or mistake.⁹⁷

§ 881. Equitable estoppel may be set up at law as a defense to an action of ejectment.—The action of ejectment involves both the right of possession and the right of property. It is a possessory action, and the plaintiff, to entitle himself to recover, must have the right of possession, and whatever takes away that right will deprive him of the remedy by ejectment; and where the conduct of the plaintiff toward the defendant in regard to the property in controversy has been such that he is not entitled in equity and good conscience to disturb the possession of the defendant, the latter may rely upon an equitable estoppel to defeat recovery in the action of ejectment, without going into equity to set up that defense. The defense may be proved under a plea of not guilty.⁹⁸

⁹⁶ Robinson v. Campbell, 3 Wheat. 207 (4:372).

⁹⁷ Jones v. McMaster, 20 How. 8, 22 (15:805).

⁹⁸ Dickerson v. Colgrave, 100 U. S. 578 (25:618); Kirk v. Hamilton, 102 U. S. 68, 79 (26:79); Allen v. Seawall, 70 Fed. R. 564;

§ 882. **Whatever tolls plaintiff's right of entry will defeat the action of ejectment.**—As the action of ejectment involves both (1) the title to the property, and (2) the right of entry and possession, it, therefore, follows, that if the defendant can show that the plaintiff's right of entry has been tolled or taken away, that will be a sufficient defense to the action, and will defeat the plaintiff's recovery.⁹⁹

§ 883. **Cross bill in equity not maintainable to recover land on a legal title.**—A defendant to a bill in equity, filed against him to cancel his claim to land as a cloud upon the title of the plaintiff who is in possession, cannot maintain a cross bill to recover the land, with rents and profits, upon a legal title; and this is true, although such suit has been removed into the federal court from a state court where such a blending of legal and equitable causes of action in one suit is permissible. In such a case, the defendant's cross bill is purely a legal action, and he cannot blend it with plaintiff's equitable action, but must proceed at law.¹⁰⁰

Cincinnati v. White, 6 Pet. 431 (8:452); *Cleveland v. Cleveland Ry. Co.*, 93 Fed. R. 123.

⁹⁹ *Atkins v. Horde*, 1 Burr, 119; *Hunter v. Trustees Sandy Hill*, 6 Hill, 411; *Olive v. Adams*, 50 Ala. 374; *Cincinnati v. White*, 6 Pet.

431 (8:452); *Dickerson v. Colgrave*, 100 U. S. 578, 584 (25:618); *Kirk v. Hamilton*, 102 U. S. 68, 79 (26:99).

¹⁰⁰ *Hurt v. Hollingsworth*, 100 U. S. 100 (25:569).

CHAPTER XVIII.

SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 884. The primary object of this work.</p> <p>885. The object of this chapter is to define suits at common law.</p> <p>886. Same—A knowledge of the scheme of the government essential to an understanding of jurisdiction and procedure.</p> <p>887. Same—Principles established in the previous discussion—Three classes of cases—Distinction between law and equity.</p> <p>888. A summary of the common-law jurisdiction of the circuit courts, concurrent with the courts of the several states.</p> <p>889. Summary of the common-law jurisdiction of the circuit courts under special statutes.</p> <p>890. Standard or rule for the classification of suits as being at law or in equity.</p> <p>891. Suits at common law defined.</p> <p>892. Same—Embraces all suits to settle legal rights.</p> <p>893. Important features of trial at common law.</p> <p>894. Classification of suits at common law.</p> <p>895. Same—Classification of contracts at common law.</p> | <p>§ 896. Actions at law are local or transitory.</p> <p>897. Same — Distinction preserved in the federal courts.</p> <p>898. Parties to actions at law.</p> <p>899. Same—Parties to actions on contracts.</p> <p>900. Same—Parties to actions <i>ex delicto</i>.</p> <p>901. The common-law action of account.</p> <p>902. Same—Concurrent jurisdiction in equity.</p> <p>903. Annuity.</p> <p>904. Assumpsit.</p> <p>905. Same—The great common-law action.</p> <p>906. Covenant.</p> <p>907. Debt.</p> <p>908. Detinue.</p> <p>909. Same—Peculiar nature of the action.</p> <p>910. Trespass <i>vi et armis</i>.</p> <p>911. Trespass on the case.</p> <p>912. Same—Defined by Tidd.</p> <p>913. Same—Action under Lord Campbell's Act.</p> <p>914. Trover.</p> <p>915. Replevin.</p> <p>916. Ejectment.</p> <p>917. Action for mesne profits.</p> <p>918. Scire facias.</p> <p>919. Same—Authority of federal courts to issue.</p> <p>920. Proceedings to condemn property for public use.</p> |
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§ 884. The primary object of this Work.—The primary object of this work, the purpose which has been kept constantly in mind by the author in all that he has written, and which will

be so kept in mind by him in all that shall be written to the end, is: (1) To develop and exhibit the jurisdiction of the courts of the United States in suits at common law, (2) to state the federal procedure in such suits in the court of original jurisdiction, and to point out the method of transferring a case at law to the appellate courts by writ of error, and (3) to differentiate the jurisdiction and procedure of suits at common law in the federal courts from the jurisdiction and procedure in suits in equity in those courts both in the court of original jurisdiction and in the appellate courts upon appeal. For reasons stated in a subsequent section, it has been found impossible to execute the purposes of the work in a detached manner, and without the more general discussion which has preceded this chapter.

§ 885. The object of this chapter is to define suits at common law.—Pursuing the object stated in the section next preceding, the purpose of this chapter is to define suits at common law, and to furnish rules and criteria (or a standard of judging), for distinguishing those suits from suits in equity; this is rendered necessary in a treatise on federal procedure at law, by reason of the fact that the statutory procedure of the states, by effectuating a union of legal and equitable remedies in the state courts, has had a strong tendency to extinguish from the minds of the legal profession the perception of the distinction between those two great systems of judicial remedies, often resulting in great confusion and inconvenience, and greatly encumbering the administration of justice, in the federal courts.¹

But suits at common law cannot be adequately defined by the announcement of general definitions, rules and principles; that can be done only by differentiation. Those actions must be enumerated and described, and their differential properties and

¹ *Bennett v. Butterworth*, 11 How. 669 (11:859); *Scott v. Armstrong*, 146 U. S. 499-513 (36:1059); *Thompson v. R. Co.*, 6 Wall. 134 (18:965); *Scott v. Neely*, 140 U. S. 106 (35:358); *Cates v. Allen*, 149 U. S. 451-465 (37:804); *Whitehead v. Shattuck*, 138 U. S. 146-156 (34:873); *Lindsay v. Bank*, 156 U. S. 485-489 (39:505); *Grand Chute v. Winegar*, 15 Wall. 373-377 (21:174); *Phoenix Life Ins. Co. v. Bailey*, 13 Wall. 616-623 (20:50); *Cable v. United States Life Ins. Co.*, 191 U. S. 288-310 (48:188); *Deweese v. Reinhard*, 165 U. S. 386-394 (41:757); *Hipp v. Babin*, 19 How. 271-279 (15:633); *Fussell v. Gregg*, 113 U. S. 550-565 (28:993); *Galt v. Galloway*, 4 Pet. 332 (7:876); *Fenn v. Holme*, 21 How. 481-488 (16:198).

characteristics developed in orderly detail; the specific differences which mark them and distinguish them from suits in equity must be formally stated and exposed to the view. It is only in this way that the differential can be obtained, and a standard of judgment established which will be a safe guide in all cases. An accurate knowledge of all the common law forms of action, and the rules and principles of law upon which they are bottomed, is absolutely essential to a recognition and preservation of that distinction between remedies at law and in equity which is established by the federal constitution.²

§ 886. Same—A knowledge of the scheme of government essential to an understanding of jurisdiction and procedure.—

The jurisdiction, both original and appellate, of the several courts of the federal judicial system, and the nature and character of the judicial remedies and procedure established and pursued in them, arise out of and are limited by the nature of the dual system of government established by the federal constitution, the relations subsisting between the federal and state governments, the constitutional powers of each, respectively, and the limitations imposed upon each of them by the fundamental law; and, for this reason, a comprehensive knowledge of the entire scheme of government is absolutely essential to an accurate knowledge and full comprehension of federal jurisdiction and procedure in all their branches and details. The judicial power vested in the general government was intended to operate not only in the administration of justice between private individuals; but, while that is one of its great objects, and not to be underestimated in importance, it was also intended to operate as an agency for the execution of the powers vested in that government, and to restrain the states within constitutional limits. Such an agency was absolutely necessary to maintain and perpetuate the complex polity established by the constitution.³ Not only the judicial power itself, but also the judicial

² *Boyle v. Zacharie*, 6 Pet. 648 (8:532); *Robinson v. Campbell*, 3 Wheat, 207 (4:372); *Scott v. Neely*, 140 U. S. 106 (35:358).

³ *M'Culloch v. Maryland*, 4 Wheat. 316-437 (4:579); *Dartmouth College v. Woodward*, 4 Wheat. 518-715 (4:629); *Cohens*

v. Virginia, 6 Wheat. 264-448 (5:527); *Brown v. Maryland*, 12 Wheat. 419 (6:678); *Gibbons v. Ogden*, 9 Wheat. 1-240 (6:23); *Ableman v. Booth*, 21 How. 506-526 (16:169); *Tarble's Case*, 13 Wall. 403 (20:599); *Re Debs*, 158 U. S. 564 (39:1092); *Northern*

remedies and procedure arise out of and are limited by the constitution.⁴ For these reasons, the attempt to state the jurisdiction and procedure of the federal courts in suits at common law has been preceded by a statement of the nature of the government, the creation and organization of the federal judiciary, and the jurisdiction of the several courts of the system, as a basis for the further prosecution of the primary objects and purposes in view. That discussion is intended by the author as an aid to federal court practitioners in ascertaining the rights and liabilities of their clients under the constitution and laws of the United States, and in determining questions of the extent of the federal judicial power, jurisdiction and procedure; and with that purpose in view the adjudicated cases are numerously cited.

Securities Co. v. United States, 193 U. S. 197-406 (48:679); *Fletcher v. Peck*, 6 Cranch, 87 (3:162); *Osborn v. Bank*, 9 Wheat, 738 (6:204); *Slaughter House Cases*, 16 Wall. 36-130 (21:395); *Poindexter v. Greenhow*, 114 U. S. 270-306 (29:185); *Martin v. Hunter*, 1 Wheat. 304-382 (4:97).

⁴ U. S. Const. art. III, sec. 2, cls. 1, 2, 3; Arts. IV, V, VI, and VII of Amendt. of the U. S. Const.; *Ins. Co. v. 356 Bales Cotton*, 1 Pet. 511 (7:242); *Bennett v. Butterworth*, 11 How. 669 (13:589); *Scott v. Armstrong*, 149 U. S. 499-512 (36:1059); *Robinson v. Campbell*, 3 Wheat. 307 (4:372); *Boyle v. Zacharie*, 6 Pet. 648 (8:532); *Thompson v. R. Co.*, 6 Wall. 134-139 (18:765); *Ex parte Sawyer*, 124 U. S. 200-225 (31:402); *Cates v. Allen*, 149 U. S. 451-465 (37:804); *Lindsay v. Bank*, 156 U. S. 485-493 (39:505); *Bagnell v. Broderick*, 13 Pet. 436 (10:235); *Foster v. Mora*, 98 U. S. 425-428 (25:191); *Highland Boy Gold Min. Co. v. Strickley*, 54 C. C. A. 186; *Schofield v. Rhodes*, 22 C. C. A. 95-97; *Davis v. Davis*, 18 C. C. A. 438-440; *Scott v. Neely*, 140 U. S. 106

(35:358); *Dravo v. Fabel*, 132 U. S. 487-490 (33:421); *Hipp v. Bablin*, 19 How. 271-278 (15:633); *Lewis v. Cocks*, 23 Wall. 466-470 (23:70); *Killian v. Ebbinghaus*, 110 U. S. 568-573 (28:246); *Buzard v. Houston*, 119 U. S. 347-355 (30:451); *Whitehead v. Shattuck*, 138 U. S. 146-156 (34:873); *Ins. Co. v. Bailey*, 13 Wall. 616-621 (20:501); *Grand Chute v. Winegar*, 15 Wall. 373-375 (21:174); *Gordon v. Jackson*, 72 Fed. R. 88; *Gombert v. Lyon*, 80 Fed. R. 305; *Erskin v. Forest Oil Co.*, 80 Fed. R. 586; *Blythe v. Hinkley*, 84 Fed. R. 256; *Davidson v. Calkins*, 92 Fed. R. 232; *Johnson v. Christian*, 128 U. S. 374-382 (32:412); *Green v. Mezes*, 24 How. 268-278 (16:661); *Jones v. McMaster*, 20 How. 210 (15:805); *Singleton v. Touchard*, 1 Black, 342-345 (17:50); *Burnes v. Scott*, 117 U. S. 882-891 (29:991); *Deweese v. Reinhard*, 165 U. S. 386-394 (41:757); *Fenn v. Holme*, 21 How. 481-488 (16:198); *French v. Edwards*, 21 Wall. 147-151 (22:534); *Lincoln v. French*, 105 U. S. 614-618 (26:1189); *Hurt v. Hollingsworth*, 100 U. S. 100-104 (25:509).

§ 887. Same—Principles established in the previous discussion—Three classes of cases—Distinction between law and equity.—In the previous discussion, the following principles, among others, have been established, which are relevant to the subject of this chapter, namely:

1. The judicial power of the United States extends to three great classes of cases, namely: (1) Suits at common law, (2) suits in equity, and (3) suits in admiralty; and the jurisdiction is exercised in each class of cases by means of and in accordance with a separate and distinct system of judicial remedies and procedure.

2. The jurisdiction of the federal courts in suits in admiralty is exclusive of the state courts; and the test of jurisdiction in admiralty is not the ebb and flow of the tide, but navigability in fact, wherever any stream, canal or body of water is, in itself, or by its connections, a highway of commerce between two or more states, or between a state and a foreign nation; and the extent of the judicial power over admiralty causes is a judicial question, to be determined in the last resort by the federal supreme court.

3. The state courts and the federal circuit courts are vested with original concurrent jurisdiction in large classes of suits both at common law and in equity, in the exercise of which they administer both state and federal laws, and enforce private rights arising under both, without regard to their origin.

4. The federal constitution, itself, establishes the distinction between common law and equity jurisprudence, and the distinction between suits at common law and suits in equity, and the distinction between the common law and equity jurisdiction of the federal courts, and the distinction between common law and equitable remedies and procedure, as they were distinguished and defined in England at the time this government was established, and imposes the requirement that, in the federal courts, legal and equitable remedies shall be separately pursued, and shall not be amalgamated or blended into one system of remedies; and, this being true, congress has no power to abolish the distinction between law and equity and legal and equitable remedies, nor to blend them into one system.

5. The distinction between causes of actions at law and suits in equity is one of substance and not of form merely, resting

in the nature of the transactions out of which they arise, and the principles of law and jurisprudence which define and regulate the nature and character of relief to which the injured party may be entitled; and the distinction between legal and equitable remedies and the requirement that they shall be separately pursued, are also matters of substance, as well as of form, for the reason that, under the federal constitution, the parties in an action at law are entitled to a trial of all issues of fact by a jury, while in a suit in equity they have no such right, and no suit in equity can be maintained when there is a plain, adequate and complete remedy at law, nor can an action at law be maintained in equity, nor is an equitable cause of action or defense available at law.

6. The federal adoption of state procedure in actions at law was not an abandonment, nor even a modification, of the federal rule by which the distinction between law and equity had been theretofore maintained, and requiring legal and equitable remedies to be separately pursued; the rule has its foundation in the constitution, and, therefore, it is not within the competency of congress to change it, either directly or by indirection.⁵

§ 888. A summary of the common law jurisdiction of the circuit courts, concurrent with the courts of the several states.—The circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, of all suits of a civil nature at common law, (1) arising under the constitution or laws or treaties of the United States, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, without regard to the citizenship of the parties, (2) in which the United States are plaintiffs, without regard to the sum or value in dispute, (3) in which there is a controversy between citizens of different states, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, (4) between citizens of the same state, claiming lands under grants of different states, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and (5) in which there shall be a controversy between citizens of a state and foreign states, citizens or subjects, where the matter in dispute ex-

⁵ Ante chapters, XIII, XIV, XV, XVI, XVII.

ceeds, exclusive of interest and costs, the sum or value of two thousand dollars.⁶

§ 889. A summary of the common law jurisdiction of the circuit courts under special statutes.—The circuit courts of the United States have original jurisdiction of all suits at common law (1) where the United States, or any officer thereof suing under the authority of any act of congress, are plaintiffs, without regard to the amount in controversy;⁷ (2) arising under the laws providing for revenue from imports or tonnage, except civil causes of admiralty and suits for penalties and forfeitures;⁸ arising under laws providing for internal revenue;⁹ arising under the postal laws;¹⁰ to recover penalties for violation of laws regulating the carriage of passengers in merchant vessels;¹¹ to condemn property used in aid of insurrection;¹² arising under laws relating to the slave trade;¹³ by assignees of debentures;¹⁴ arising under the patent laws;¹⁵ arising under the copyright laws;¹⁶ by the United States or federal officers against national banking associations;¹⁷ to recover damages for injuries done to persons or property under the revenue laws;¹⁸ to enforce the rights of citizens to vote;¹⁹ to redress deprivation of rights secured by the constitution and laws of the United States;²⁰ for injuries resulting from conspiracies in violation of the civil rights act;²¹ by and against trustees in bankruptcy;²² to condemn private property for public use by the federal govern-

⁶ Ante secs. 668–736, where the above grounds of jurisdiction are discussed and the authorities cited.

⁷ Ante secs. 737–739, where the ground of jurisdiction is discussed and authorities cited.

⁸ Ante secs. 740–741, and authorities cited.

⁹ Ante secs. 740–741, and authorities cited.

¹⁰ Ante secs. 743–744, and authorities cited.

¹¹ Ante sec. 746, and authorities cited.

¹² Ante sec. 747, discussed and authorities cited.

¹³ Ante sec. 748, and authorities cited.

¹⁴ Ante sec. 749, and authorities cited.

¹⁵ Ante secs. 750–756, discussed and authorities cited.

¹⁶ Ante secs. 757–759, discussed and authorities cited.

¹⁷ Ante sec. 760, and authorities cited.

¹⁸ Ante sec. 762, and authorities cited.

¹⁹ Ante sec. 763, and authorities cited.

²⁰ Ante sec. 764, and authorities cited.

²¹ Ante secs. 766–7.

²² Ante sec. 767.

ment;²³ against the government under the "Tucker Act;"²⁴ under laws prohibiting importation of foreigners under contract to labor;²⁵ to recover possession of the public lands held in violation of law;²⁶ seizure and destruction of obscene books, pictures and other articles imported in violation of law;²⁷ to protect trade and commerce against unlawful restraints and monopolies;²⁸ under the act to regulate commerce;²⁹ and to naturalize aliens as citizens of the United States.³⁰

§ 890. Standard or rule for the classification of suits as being at law or in equity.—Whether a suit is one at common law or in equity must be determined by the laws of England classifying such suits and defining the distinctions between them, as those laws existed at the time of the adoption of the federal constitution, and the submission and adoption of the seventh amendment. The remedies in the courts of the United States are at common law or in equity, not according to the laws of the state, but according to the principles of common law and equity, as distinguished and defined in England from which we derived our knowledge of those principles. The distinction between the two classes of cases, and the two systems of remedies, was present in the minds of the framers of the constitution and the seventh amendment, and they intended to adopt the classification and the rules and principles defining the distinction between the two classes, as they existed in the laws of England. Those rules and principles are elastic and comprehensive, and, for the purposes of classification of suits and the defining of the distinctions between them and the remedies to be pursued in their prosecution, embrace not only the rights and causes of action recognized by law at the time of the adoption of the constitution, but all which have since been or may hereafter be created or recognized by law. Whenever and wherever, within the limits of the union, a new cause of action arises, the principles of the English law are, by virtue of the constitutional provisions, present and operative, for the purpose of classifying the suit as at

²³ Ante sec. 768.

²⁴ Ante sec. 769, and authorities cited.

²⁵ Ante sec. 770, and authorities cited.

²⁶ Ante sec. 771, and authorities cited.

²⁷ Ante sec. 773.

²⁸ Ante sec. 774, and authorities cited.

²⁹ Ante secs. 780–782.

³⁰ Ante sec. 782.

law or in equity, defining the distinction between the two classes, and indicating the judicial remedies to be pursued in the assertion of the right, and this is true although the right to be asserted has been created by state legislation.³¹

§ 891. Suits at common law defined.—A suit at common law is a suit based upon a legal title, or legal right, or legal interest, or legal estate, brought to assert and vindicate that title, right, interest or estate, and to obtain some legal relief concerning it. All actions which seek to recover the possession of specific property, real or personal, with or without damages for its detention, and all actions which seek to recover a money judgment as a debt, or as damages for the breach of a contract or for an injury to person or property, real or personal, are suits at common law.³²

§ 892. Same—Embraces all suits to settle legal rights.—The words, “cases in law,” used in the third article of the constitution, and the words “suits at common law,” used in the seventh amendment, which preserve the right of trial by jury in that class of cases, embrace not merely suits which the common law recognized among its old and settled forms of action, but all suits brought to ascertain and determine legal rights which are not of equity or admiralty jurisdiction, whatever may be their peculiar form, or the origin or source of the cause of action; and in all such cases tried in the circuit courts of the United States the parties have a constitutional right to have all the facts determined by a common-law jury.³³

§ 893. Important features of trials at common law.—The great and important features of trials at common law, and the reason for maintaining the distinction between suits at common law and suits in equity, in the courts of the United States, are: (1) In all suits at common law where the value in controversy shall exceed twenty dollars, the parties have a constitutional right to a trial by jury; and (2) the constitution secures to the

³¹ Robinson v. Campbell, 3 Wheat. 207 (4:372); Boyle v. Zacharie, 6 Pet. 648 (8:532); Bennett v. Butterworth, 11 How. 669 (13:589); Fenn v. Holme, 21 How. 487–488 (16:191); Parsons v. Bedford, 3 Pet. 433 (7:732); Van Norden v. Morton, 99 U. S. 378–382 (25:453).

³² Stephen's Pl. (Philadelphia Ed. 1824) 3; 1 Chitty, Pl. (12th Am. Ed.) 97; Scott v. Neely, 140 U. S. 106–117 (35:358).

³³ Parsons v. Bedford, 3 Pet. 433 (7:732); Parish v. Ellis, 16 Pet. 451–454 (10:1028); Scott v. Neely, 140 U. S. 106–117 (35:358).

parties the further right that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."³⁴ At common law there was no method for the re-examination of facts tried by a jury, except the granting of a new trial by the court where the issue was tried, or into which the record was returnable, or the awarding of a *venire facias de novo*, by an appellate court, upon writ of error, for some error of law which intervened in the foundation, pleadings, proceedings, judgment or execution, in the trial court.³⁵

§ 894. Classification of suits at common law.—Civil actions at common law are either *ex contractu* or *ex delicto*, being founded upon contracts, or for wrongs independently of contract; they are also divided into real, personal and mixed actions.

The common-law actions upon contract are Account, Annuity, Assumpsit, Covenant, Debt and *Scire facias*; and the common-law actions for wrongs or torts are Trespass *vi et armis*, Trespass on the case (called in the books case), Trover, Detinue and Replevin.

Real actions are those brought for the specific recovery of lands, tenements or hereditaments; personal actions are those brought for the specific recovery of goods and chattels, or for debts, or damages for breach of contract, or for wrongs; mixed actions are such as partake of the nature of both the other two classes, and are brought for the specific recovery of lands and for damages for injuries sustained in respect to it.³⁶

§ 895. Same—Classification of contracts at common law.—The forms of actions at common law upon contract, were largely determined by the character of the contracts themselves, and in any examination into the character and nature of suits at common law in England, it is important to keep in mind the common-law classification of contracts.³⁷ All contracts are divided by the law of England into three classes, namely: (1) Contracts by matter of record; (2) Contracts under seal, or by deed; (3) Contracts not under seal, or simple contracts.³⁸

³⁴ VII art. of Amndt. to the U. S. Const.

³⁵ *Parsons v. Bedford*, 3 Pet. 433 (7:732); *Stephens*, Pl. (Philadelphia ed. 1824) 114-120.

³⁶ 1 *Tidd's Prac.* (1807) 1-7; 1 *Chitty*, Pl (12th Am. ed.) 97;

Stephen's Pl. (Philadelphia ed. 1824) 3, 9-23.

³⁷ 1 *Selwyn's Nisi Prius*, 35, 374, 446; 1 *Tidd's Prac.* 2; 1 *Chitty*, Pl. (12th Am. ed.) 115.

³⁸ *Smith on Contracts* (4th Am. ed.) 50-53.

A recognizance is a familiar instance of a contract by matter of record; it is a debt of record, entered into before some court, judge or magistrate, having authority to take the same, with condition to do some particular act; and it was either at common law, or by statute, as by statute merchant or statute staple. A recognizance at common law is either to the king, or a subject, and may be acknowledged before any one of the judges out of term, and in any part of England, and may be entered on record, as well out of term as in term; but recognizances at common law are not perfect records till they are enrolled in some court of record. By the custom of the city of London, the mayor and aldermen, or the mayor singly, may take recognizances, for the custom is not only reasonable in itself, but has been confirmed by act of parliament.³⁹

A contract under seal, or a deed, as it is called, is a written instrument sealed and delivered, and at common law it was presumed to have been made upon a sufficient consideration, good or valuable; but a party sued on such a contract was allowed to show that it was founded upon an illegal or immoral consideration, or was obtained by fraud or duress. It was not essential at common law that such a contract should be signed, but the statute of frauds made signature essential to the validity of certain specified contracts.⁴⁰

Simple contracts, or contracts not under seal, embrace all contracts not by record, or by deed, whether they be written or rest in parol. They are called verbal contracts, although they may be written. The common law of England made no distinction between a written contract not under seal, and a contract resting in parol.⁴¹

§ 896. Actions at law are local or transitory.—By the common law of England, suits at common law were either local or transitory. When the action could only have arisen in a particular county, it was local, and the venue must have been laid in that county; for if laid elsewhere, the defendant might have demurred to the declaration, or the plaintiff, on the general issue, would have been nonsuited at the trial. All real and mixed ac-

³⁹ Tidd's Prac. 983-986; Smith ed.) 53-76; Paxton v. Popham, 9 on Contracts (4th Am. ed.) 50-51; East, 421; Mitchell v. Reynolds, 1 Cain v. Emery, 2 Berrily, 431; P. Wms. 181. Page v. Mississippi, 25 Miss. 54.

⁴¹ Smith on Contracts (4th Am. ed.) 87; 1 Selwyn's Nisi Prius, 35.

tions, all actions for the recovery of the seizin or possession of land or other real property, and all actions for the recovery of damages for injuries to real property, such as actions of ejectment, trespass *quare clausum fregit*, including actions for mesne profits, and all actions of trespass *vi et armis*, or actions of trespass on the case, for injuries, nuisance or waste to houses, lands, watercourses, right of common, ways, or other real property, are, by the common law, local actions. But where the action might have arisen in any county, such as actions upon contracts, and actions for injuries *ex delicto* to the person or to personal property, it was transitory. An action upon a lease for rent in arrears, or other breach of covenant, when founded upon privity of contract, is transitory, and the venue may be laid in any county, at the option of the plaintiff; but when the action is founded upon privity of estate, it is local, and the venue must be laid in the county where the estate lies.⁴² An action of debt for use and occupation, founded upon an implied contract, being founded upon privity of contract and not upon privity of estate, is transitory.⁴³

§ 897. Same—Distinction preserved in the federal courts.—The distinction between local and transitory actions is recognized in all the federal legislation upon the subject as to where suit shall be brought, and has been steadily maintained in the judicial decisions.⁴⁴

§ 898. Parties to actions at law.—The general rule is that an action at common law should be brought in the name of the party whose legal right has been affected, against the party who

⁴² 1 Tidd's Prac. (1807) 368-375; 1 Chitty, Pl. (12th Am. ed.) 267-273; Roach v. Damron, 2 Humph. (Tenn.) 425; Livingston v. Story, 1 Brock. 203, Fed. Cas. 8411; Watts v. Kinney, 6 Hill, 82; American Union Tel. Co. v. Middleton, 80 N. Y. 408; Craig v. Lowell, 88 N. Y. 263; Ellenwood, Adm. v. Marietta Chair Co., 158 U. S. 105-108 (39:913); McKenna v. Fisk, 1 How. 241-277 (11:117); Doulson v. Matthews, 4 Term (Durnford & East) reports, 503; 1 Bates, Fed. Eq. Proc. secs. 69-77.

⁴³ Corporation v. Dawson, 2 Johns. Cas. 335-337; Low v. Hal-

lett, 2 Caines, Cas. 374; Egler v. Marsden, 5 Taunt. 25; King v. Fraser, 6 East, 352-353; Henwood v. Cheeseman, 3 Serg. & Rawle, 500.

⁴⁴ U. S. Rev. Stat. secs. 738, 739, 740, 741, 742; 18 U. S. Stat. at L. ch. 137, sec. 8, pp. 470-473; Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; McKenna v. Fisk, 1 How. 241-279 (11:117); Ellenwood, Admr. v. Marietta Chair Co., 158 U. S. 105-108 (39:913); 1 Bates, Fed. Eq. Proc. secs. 73-77, containing a full discussion of this subject.

committed or caused the injury, or by or against his personal representatives; and, therefore, a correct knowledge of legal rights, and of wrongs remediable at law, will, in general, direct by and against whom actions should be brought.⁴⁵

§ 899. **Same—Parties to actions on contracts.**—By the rules of the common law, an action on a contract, whether express or implied, or whether by parol, or under seal, or of record, must be brought in the name of the party in whom the legal interest in such contract is vested. The courts of law do not, as a general rule, take notice of mere equitable rights, as contradistinguished from the strict legal title and interest; so as to invest the equitable claimant with the ability to adopt legal proceedings in his own name; for to do so would be to destroy the fundamental distinction between courts of law and courts of equity, with regard to the remedy peculiar to each jurisdiction.

Actions upon contract should be brought by the party with whom the contract was made, if living, or by his executors or administrators, if he be dead, or by his assignees if he be a bankrupt; and it should be brought against the party who made the contract, or if he be dead, against his executors or administrators; but upon the contract of a bankrupt an action at law does not lie against his assignees. Where there are several parties to a contract, the action should be brought by or against all of them, if living; or if some be dead, by or against the survivors.

When one or more of several obligees, covenantees, partners or others having a joint legal interest in the contract, dies, the action must be brought in the name of the survivor, and the executor or administrator of the deceased should not be joined, nor can he sue separately, though the deceased alone might be entitled to the beneficial interest in the contract.⁴⁶

§ 900. **Same—Parties to actions ex delicto.**—An action upon tort must be brought in the name of the party to whom the injury is done, against the party doing it; or in the name of the person whose legal right has been affected, and who was legally interested in the property at the time the injury thereto was committed, and against the wrong-doer. In cases of injury to the person, it is a rule of the common law that, if either the party who received or committed the injury, die, no action can

⁴⁵ 1 Chitty, Pl. (12th Am. ed.) 1.

⁴⁶ 1 Chitty, Pl. (12th Am. ed.) 1, 2, 18, 19; 1 Tidd's Prac. (1807) 7.

be maintained either by or against the executor or other personal representative; and the same rule applied to injuries to personal property, where one of the parties died and the injury must have been in form *ex delicto*. Where several parties have suffered a joint injury, they should all join in the same action; and if they do not the defendant may plead in abatement, but cannot otherwise take advantage of the objection. And as wrongs are of a joint and several nature, the plaintiff may proceed against all or any of the parties who committed them; and it is not a good plea in abatement that there are other parties who engaged in committing the wrong, but who are not sued in the action.

The person in possession of real property corporeal, whether lawfully or not, may sue for an injury committed by a stranger, or by any person who cannot establish a better title; and in trespass to land, the person actually in possession, though he be only a *cestui qui trust*, should be the plaintiff and not the trustee. But it is otherwise in ejectment which is an action to try the right, in which the legal title will prevail.⁴⁷

§ 901. **The common law action of account.**—By the ancient common law, amended by an English statute,⁴⁸ old enough to have been common law in the colonies,⁴⁹ the common-law action of account lies against a guardian in socage, bailiff, receiver, the executor and administrator of every guardian, bailiff and receiver, and also by one joint tenant and tenant in common, his executor and administrator, against the other, as bailiff, for receiving more than comes to his just share or proportion, and against his executor and administrator, to compel an accounting of the money, rents, issues and profits received by the defendant, his testator or intestate, and to recover judgment final for the balance found upon such accounting to be due the plaintiff; and in the proceedings in such cause, all issues of fact, including the duty to account, are triable by jury. There are two judgments in the proceeding, namely: (1) an interlocutory judgment that the defendant do account, commonly called a judgment *quod computet*, based upon the finding of the jury that he is liable to account and that he has not fully accounted, and

⁴⁷ 1 Tidd's Practice (1807) 7, 8; ⁴⁸ Scott v. Lunt, 7 Pet. 596 (8: 1 Chitty, Pl. (12th Am. ed.) 59-68. 797).

⁴⁹ Statute 4 and 5 Anne, ch. 16, sec. 27.

(2) judgment final in favor of the plaintiff and against the defendant for the ultimate balance found in favor of the plaintiff upon the report of the auditors. In order to maintain the action, there must be privity in deed or in law, for an action of account does not lie against a disseizor or other wrongdoer.⁵⁰

§ 902.—**Same—Concurrent jurisdiction in equity.**—In all cases in which an action of account would be the proper remedy at law, and in all cases where a trustee is a party, courts of equity have concurrent jurisdiction with the courts of law.⁵¹

§ 903. **Annuity.**—The common law action of annuity lay for the recovery of an annuity, or yearly payment of a certain sum of money, granted to another in fee, for life or years, charging the person of the grantor only; and the action could have been brought by the grantee, his heirs, or his or their grantees, against the grantor or his heirs. This action was, at the beginning of the nineteenth century, obsolete, having been superseded by the actions of debt and covenant, and it is mentioned here only for the purpose of illustrating the distinction between legal and equitable causes of action.⁵²

§ 904. **Assumpsit.**—The common law action of assumpsit lies for the recovery of damages upon promises, express or implied, without deed; that is to say, the action lies for the recovery of damages for the non-performance or breach of any simple contract, express or implied.⁵³

Assumpsit is either (1) special, or (2) general. It is special where the plaintiff declares upon and specially states the original contract expressly made by the parties, and seeks to recover damages for its non-performance or breach. It is general where the plaintiff, having executed the contract on his part, instead of declaring on it as originally made, declares upon the promise raised or implied by law, upon its execution by him, or upon an express promise made by the defendant upon such executed con-

⁵⁰ Selwyn's Nisi Prius, 1-6; 1 Tidd's Prac. (1807) 1; 3 Blk. Com. 162; 3 Chitty, Pl. (12th Am. ed.) 1297-1299.

⁵¹ Fowle v. Lawrason, 5 Pet. 495 (8:204); 1 Tidd's Prac. (1807) 1.

⁵² 1 Tidd's Prac. (1807) 4; 1 Saunders, Pl. & Ev. 126-130, tit. Annuity.

⁵³ 1 Tidd's Prac. (1807) 1, 2; 1 Chitty, Pl. (12th Am. ed.) 98-108; 1 Selwyn's Nisi Prius, 35; 1 Saunders, Pl. & Ev. 162-167; Stephen's Pl. (Philadelphia ed. 1824) 16, 17; 1 Spence, Equitable Jurisdiction Court of Chancery, 244-248.

sideration.⁵⁴ The declaration in general assumpsit is upon either: (1) an *indebitatus assumpsit*, wherein the plaintiff alleges in general terms that the defendant being indebted to him in a certain specific sum for money had and received by the defendant to plaintiff's use, or money laid out and expended by plaintiff for defendant, or work and labor performed by plaintiff for defendant, or goods, wares and merchandise sold and delivered, or for the hire of goods, or the purchase, assignment, or use of lands, promised to pay that sum to the plaintiff on request; or (2) upon an *insimul computassent*, wherein it is alleged that the defendant on a named day, month and year, accounted with the plaintiff of and concerning diverse sums of money before then due from the defendant to the plaintiff, and then in arrear and unpaid, and that upon such accounting, the defendant was then found to be in arrear to plaintiff in a named sum, and that being so found in arrear and indebted, the defendant in consideration thereof then promised the plaintiff to pay him the same on request; or (3) upon a *quantum meruit*, wherein it is alleged that in consideration that the plaintiff, at the request of the defendant, had performed work and labor for him, he, the defendant, promised plaintiff to pay him so much money as he therefor reasonably deserved to have, and that therefore the plaintiff deserved to have a named sum of money, whereof the defendant afterwards had notice; or (4) upon a *quantum valebat*, wherein it is alleged, that in consideration that the plaintiff, at the request of the defendant, had sold and delivered certain goods to the defendant, he, the defendant, promised the plaintiff to pay him so much money as the goods were reasonably worth, and that they were reasonably worth a named sum, and that the defendant had notice thereof.⁵⁵

It has long been settled, that the counts upon *quantum meruit* and *quantum valebat* are wholly unnecessary, and that under an *indebitatus* count in assumpsit and debt the plaintiff may recover, although there be no evidence of a fixed price.⁵⁶ The in-

⁵⁴ Lawes on Pl. (1811) 1-37, 38, 266; 1 Chitty, Pl. (12th Am. ed.) 288; Bank of Columbia v. Patterson, 7 Cranch, 299 (3:351); Arnett v. Evans, Walker R. (Miss.) 473; Dermott v. Jones, 23 How. 220-235 (16:442); Perkins v. Hart, 11 Wheat. 237 (6:463); 1 Saunders, Pl. & Ev. 180.

⁵⁵ 1 Chitty, Pl. (12th Am. ed.) 341, 342; Lawes on Pl. 322, 384, 385; 1 Tidd's Prac. (1807).

⁵⁶ 1 Chitty, Pl. (12th Am. ed.) 342.

debitatus count in assumpsit is founded on an express or implied promise to pay money in consideration of a precedent and existing debt; and the general rule is that the consideration must have been executed, not executory, and the plaintiff must have been entitled to payment in money, not merely to the delivery of a bill of exchange or of goods, unless the time for payment of such bill has expired.⁵⁷

§ 905. **Same—The great common law action.**—The history of civil government has demonstrated the proposition that no state or nation can develop and establish a great and enlightened system of law and jurisprudence, without providing and maintaining, concurrently, an effective system of legal remedies for the enforcement of the rights, duties and liabilities of persons, created and defined by the substantive law; if there be no remedy to enforce the right or obligation, the principle of law giving the right or imposing the duty will wither and perish from the system. No agency ever did more to ameliorate the conditions of the English common law, and to enrich and expand its principles, than the action of assumpsit. Prior to the introduction of this action, the actions of covenant, debt and detinue were the only remedies for the enforcement of executory contracts, and they were wholly inapplicable to a vast number of cases of unperformed contracts, and more particularly promises raised by implication of law. The action of assumpsit has often been declared to be a remedy of an equitable nature; not that it could be entertained upon equitable titles, but that it applied to a large class of cases in which the party was deemed “in equity and good conscience” to have made a promise, though such promise was never in fact actually made. The development of the action proceeded upon the principle that the law intends “that every man has engaged to perform what his duty and justice require.” Its development was a case of “conscience encroaching upon the common law.” It was through the medium of this action that the law-merchant was incorporated into and became a part of the common law, and a comprehensive and rational system of law

⁵⁷ 1 Chitty, Pl. (12th Am. ed.) 340, 346, 347; Brooks v. Scott, 2 Mumf. 344; Snedcor v. Leachman, 10 Ala. 330; Hunneman v. Grafton, 10 Metcalf, 454; Hanna v. Mills, 21 Wend. 90; Yale v. Coddington, 21 Wend. 175; Mussen v. Price, 4 East, 147; Haskins v. Duperoy, 4 East, 498; Hall v. Heightman, 2 East, 145; Cutler v. Powell, 6 T. R. 320.

on the subject of bills of exchange and promissory notes was, with some assistance of the legislature, developed and established by the judicial decisions of Lord Mansfield and his colleagues and their successors; and through the same instrumentality, and under the influence of the same great judge, the law of insurance was formed into a system, and adapted to all the exigencies of society.⁵⁸

§ 906. **Covenant.**—The action of covenant lies for the recovery of damages for the breach of a covenant or contract under seal, whether such covenant be contained in a deed-poll or indenture, or be expressed or implied by law from the terms of the deed, or be for the performance of something *in futuro*, or something that has been done.⁵⁹

§ 907. **Debt.**—The action of debt lies for the recovery of a debt *eo nomine et in numero*; and the damages to be recovered in it are for the detention of the debt, and are, in most cases, merely nominal. It lies upon a simple contract, a specialty, a record, or a statute, whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty.⁶⁰

§ 908. **Detinue.**—The action of detinue lies for the recovery *in specie* of goods and chattels and deeds and writings or their value. In order to maintain the action, the plaintiff must have an absolute or special property in the articles sued for, and the right to the immediate possession, though it is not necessary that he should ever have had the actual possession thereof. When the action is for several articles, the verdict of the jury should assess the value of each separately, and the judgment is in the alternative that the plaintiff recover the goods, or the value thereof, each article separately, if he cannot have the goods themselves, and his damages for the detention and his full costs of suit. Detinue is the only remedy by suit at common law for the recovery of a personal chattel *in specie*, unless in those cases where the party can gain possession by replevin.⁶¹

⁵⁸ 1 Spence, *Equitable Jurisdiction of the Court of Chancery*, 235–250.

⁵⁹ 1 Tidd's *Prac.* (1807) 2; 1 Chitty, *Pl.* (12th Am. ed.) 115–120; 1 Selwyn's *Nisi Prius*, 375, 376; 1 Saunders, *Pl. & Ev.* 853–856; Stephen, *Pl.* (Philadelphia ed. 1824)

13; Fletcher v. Peck, 6 Cranch, 87–146 (3:162).

⁶⁰ 1 Chitty, *Pl.* (12th Am. ed.) 108–115; 1 Saunders on *Pl. & Ev.* 895–900; 1 Selwyn's *Nisi Prius*, 446–450.

⁶¹ 1 Chitty, *Pl.* (12th Am. ed.) 120a–124; 1 Saunders on *Pl. & Ev.*

§ 909. **Same—Peculiar nature of the action.**—Mr. Chitty, in his work on pleading, in regard to this action, says:

“The action of *detinue* is the only remedy by suit at law for the recovery of a personal chattel *in specie*, except in those instances where the party can obtain possession by replevying the same, and by action of replevin. In trespass, or trover, for taking or detaining goods, or in assumpsit for not delivering them, *damages* only can be recovered.

“This is an action somewhat peculiar in its nature, and it may be difficult to decide whether it should be classed amongst forms of action *ex contractu*, or should be ranked with actions *ex delicto*. The right to join *detinue* with debt, and to sue in *detinue* for not delivering goods in pursuance of the terms of a bailment to the defendant, seem to afford ground for considering it rather as an action *ex contractu* than an action of tort. On the other hand, it seems that *detinue* lies although the defendant wrongfully became the possessor thereof in the first instance, without relation to any contract. And it has recently been considered as an action for tort, the gist of the action not being the breach of a contract, but the *wrongful detainer*, for which reason, although a declaration in *detinue* has stated a bailment of defendant and his engagement to *re-deliver on request*, and the defendant has pleaded that the bailment was a security for a loan, the plaintiff may, without being guilty of a departure, reply that he tendered the debt, and that the defendant afterwards wrongfully withheld the goods.”⁶²

§ 910. **Trespass vi et armis.**—The action of trespass *vi et armis* lies to recover damages for immediate injuries committed with force either actual or implied upon the person or property of the plaintiff, by the defendant. A trespass is an injury committed with violence; and this violence may be either actual or implied; and the law will imply violence, though none is actually used, where the injury is of a direct and immediate kind, and committed on the person, or tangible and corporeal property of the plaintiff. Of actual violence, an assault and battery is an instance; of implied violence, a peaceable, but wrongful entry upon the plaintiff's land is an instance. To sustain the action,

956-962; 1 Selwyn's Nisi Prius, ⁶² 1 Chitty, Pl. (12th Am. ed.)
545-548; Stephen Pl. (Philadel- 121-122.
phia ed. 1824) 13.

the injury must be immediate, and not consequential; and an injury may be considered immediate when the act complained of itself, and not a mere consequence of that act, occasions the injury.⁶³

§ 911. **Trespass on the case.**—The action of trespass on the case, called “case,” lies to recover damages for a consequential injury. Actions on the case are founded on the common law, or upon statutes, and lie to recover damages for torts not committed with force, actual or implied; or having been occasioned by force, when the matter affected was not tangible, or the injury was not immediate, but consequential; or where the interest in the property was only in reversion; in all which cases trespass is not sustainable. A question frequently arises as to whether the proper remedy is by action of trespass *vi et armis*, or trespass on the case, and the true distinction is that: “If the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, trespass *vi et armis* is the proper remedy; but where the injury is not direct and immediate on the act, but consequential only, then the remedy is by action on the case, sometimes termed an action on the case for consequential damages.”⁶⁴

§ 912. **Same—Defined by Tidd.**—In Tidd’s Practice, the action of trespass on the case is tersely defined as follows:

“Actions on the case are founded on the common law, or given by act of parliament; and lie to recover damages for consequential wrongs or torts; to persons individually or relatively; or to personal property, or real property, or some right or privilege incident thereto. These actions arise from *malfeasance*, or doing what the defendant ought not to do; or *nonfeasance*, or not doing what he ought to do; and *misfeasance*, or doing what he ought to do, improperly; and are commonly for doing or omitting something contrary to the general obligation of law, the particular rights or duties of the parties, or some implied contract between them. To persons *individually*, they are for some consequential hurt or damage, arising from public nuisances, or keeping ma-

⁶³ 1 Chitty, Pl. (12th Am. ed.) 165a-186; 2 Saunders, Pl. & Ev. 1082; 2 Selwyn’s Nisi Prius, 481-515; Stephen’s Pl. Philadelphia ed. 1824) 14; 1 Tidd’s Prac. (1807) 6-7.

⁶⁴ 1 Chitty, Pl. (12th Am. ed.) 131-144; 1 Selwyn’s Nisi Prius, 365; 1 Saunders, Pl. & Ev. 715-727; 1 Tidd’s Prac. 4-5.

licious animals; in nature of conspiracy; for malicious prosecutions (of civil suits or criminal charges); libels, *scandalum magnatum*, or defamation of common persons; against justices or officers for refusing bail, or against surgeons for improper treatment. To persons *relatively*, they are for criminal conversation, seducing or harboring wives, debauching daughters, enticing away or harboring apprentices, and other servants; or for menacing, beating or imprisoning wives, daughters or servants, *per quod consortium vel servitium amisit*. To *personal* property, they are actions of *trover* and conversion; for *negligence*, in riding horses, driving carriages, navigating vessels, or performing works; against sheriffs and other officers, for escapes, false returns, or taking insufficient pledges, for excessive or irregular distresses, pound-breach, and rescue of distresses for rent or damage-feasant; rescue of prisoners; for unlawfully exercising trades or imitating inventions; or for deceit, on the sale of cattle or goods, or immoderate use of them when lent or hired; and against carriers, by land or by water, wharfingers, innkeepers, farriers. To real property *corporeal*, they are for nuisances of a private nature, to house, lands, to the prejudice of plaintiff's possession or reversion; against tenants in the nature of waste; for not repairing fences, or for not carrying away tithes. And to real property *incorporeal*, they are for disturbance of common, of pasture, ways, offices, franchises, tolls, ferries and seats in churches.⁶⁵

§ 913. **Same—Actions under Lord Campbell's Act.**—As shown in the two sections next preceding, actions on the case are founded upon the common law, or are given by act of parliament; and, accordingly, such actions may be maintained in the circuit courts of the United States, upon the statutes of the several states, enacted in conformity, more or less, with what is known as Lord Campbell's act, giving damages to the wife, husband, child, or parent of any person whose death has been caused by the negligent act of any person or corporation, against the wrong-doer. The action is a transitory one, and can, as a general rule, be maintained wherever the wrongdoer may be found, if not contrary to the public policy of the state where the suit is brought.⁶⁶ But a circuit court of the United States has no

⁶⁵ 1 Tidd's Prac. (1807) 56.

U. S. 11 (26:439); Texas & P. R.

⁶⁶ Dennick v. Central R. Co., 103

Co. v. Cox, 145 U. S. 593 (36:829);

jurisdiction at common law of a suit for damages for death by wrongful act arising under the Mexican laws, for the reason that the court has no power to make and execute a decree of the kind contemplated by the Mexican statutes.⁶⁷

§ 914. **Trover.**—The action of trover is a special action upon the case, which may be maintained by any person who has either an absolute or special property in goods, for the recovery of damages to the extent of the value thereof, against another person, who, having possession of the goods, by any means whatsoever, has converted them to his own use. It is an action for the recovery of damages to the extent of the value of the thing converted. In order to support the action, it is requisite (1) that the plaintiff must, at the time of the conversion, have had a complete property, either general or special, in the goods, and also the actual possession, or the right to the immediate possession of them, and (2) there must have been a wrongful conversion of the goods by the defendant.⁶⁸

§ 915. **Replevin.**—Replevin at common law, as amended by some ancient statutes, lies to try the legality of a distress or other seizure of goods, and to recover damages for their seizure and detention; the plaintiff can only recover damages for the taking of the goods, and for their detention till the time of the replevy, and not the value of the goods themselves. The possession of goods unjustly taken and detained was regained, not by the suit itself, but through the medium of and upon an application to the sheriff, upon giving him security to prosecute an action against the person making the seizure, for the purpose of trying its legality, and if found to be legal to return the goods. The action, which is local, is commenced by the filing of a complaint in the sheriff's county court, pursuant to the condition of the replevin bond, and from thence it is removed for trial into one of the superior courts by a writ either of *recordari facias loquelam* or *accedas ad curiam*, and is in form an action for damages for the illegal taking and detention of the goods and chattels. To support the common-law action of replevin, the plain-

Northern P. R. Co. v. Babcock, 154 U. S. 190 (38:958); Stewart v. Baltimore & O. R. Co., 168 U. S. 445 (42:537); Baltimore & O. R. Co. v. Joy, 173 U. S. 226 (43:677).

⁶⁷ Slater v. Mexican National R. Co., 194 U. S. 120-135 (48:900).

⁶⁸ 1 Chitty, Pl. (12th Am. ed.) 144-162; 2 Selwyn's Nisi Prius, 516-532; 2 Saunders, Pl. & Ev. 1138-1139.

tiff must, at the time of the caption, have had either a general or special property in the goods taken.⁶⁹ Where there has been a distress for rent, replevin lies only where no sum whatever is in arrear, or where there has been a tender of all that was in arrear, and where the original seizure was totally unjustifiable; if any sum, however small, were due, and the distress were for a greater sum, or excessive, or otherwise irregular, the remedy must be by action on the case.⁷⁰

§ 916. **Ejectment.**—The action of ejectment lies for the recovery of the possession of real property, in which the plaintiff has the legal title and a possessory right, or right of entry, whether such title be to an estate in fee simple, or for life, or for years. It is a mixed action, for the recovery of the property with damages, but at common law only nominal damages could, as a general rule, be recovered in ejectment. The action cannot be commenced until the plaintiff's right of entry has accrued.⁷¹ To sustain the action at common law, and in the federal courts, the plaintiff must prove a legal title in himself to the premises at the time of the demise laid in the declaration, and his legal title must continue until the trial, and evidence of an equitable title is inadmissible to sustain the action.⁷²

§ 917. **Action for mesne profits.**—At common law, only nominal damages and costs are recoverable in the action of ejectment; and in order to complete the remedy of the plaintiff for damages, when the possession has been long detained, an action of trespass *vi et armis* for the mesne profits must be brought after the recovery in ejectment. In this action, the plaintiff complains of his ejection, of the reception of the mesne profits by the defendant, and of the waste or dilapidations, if any, committed or suffered by him, and prays judgment for the damages thereby sustained; and in estimating the damages the jury are not confined to the mere rent or annual value of the premises,

⁶⁹ 1 Chitty, Pl. (12th Am. ed.) 162-165a; Stephen Pl. (Philadelphia ed. 1824) 20-21; 2 Selwyn's Nisi Prius, 347-364; 2 Saunders, Pl. & Ev. 767-770.

⁷⁰ 1 Saunders, Pl. & Ev. 964; 2 ib. 768, and cases cited.

⁷¹ 1 Chitty, Pl. (12th Am. ed.) 186-193; 1 Selwyn's Nisi Prius,

564-570; 1 Saunders, Pl. & Ev. 979-998; Davis v. Delpit, 3 Cush. (Miss.) 445.

⁷² Goodtitle v. Jones, 7 Term Rep. 49; Doe v. Wroot, 5 East, 138; Roe v. Read, 8 Term Rep. 118; Fenn v. Holme, 21 How. 487-488 (16:191; ante, sec. 859).

but may give such extra damages as they may think the circumstances of the case demand, to which may be added the costs of the action of ejectment, including the costs incurred by plaintiff in a court of error, in reversing the judgment in ejectment erroneously obtained by defendant.⁷³

§ 918. *Scire facias*.—*Scire facias* is a judicial writ, and lies at common law by or against the original parties or their representatives to have execution on a judgment, statute, or recognizance, for the sum recovered, or acknowledged to be due, or to repeal letters patent. But though a *scire facias* be a judicial writ, yet because the defendant may plead thereto, it is considered in law as an action. Upon a recognizance, a *scire facias* is an original proceeding, but upon a judgment it is a continuation of the former suit. A *scire facias* to revive a judgment is in the nature of an action on the judgment, as to the parties sought to be charged by it, and must be sued out of the same court where the judgment was given, if the record remains there, or if it has been removed, then out of the court where the record is lodged. It is a rule of the common law that where a new party is to be benefited or charged by the execution of a judgment, there ought to be a *scire facias* to make him a party to the judgment; but where the execution is not beneficial or chargeable to a person, who was not a party to the judgment, a *scire facias* is unnecessary.⁷⁴

§ 919. *Same*—*Authority of federal courts to issue*.—By the fourteenth section of the original judiciary act, the federal supreme court, and the circuit and district courts were given power to issue writs of *scire facias*, and that provision of the statute has been ever since continued in force.⁷⁵ For the purpose of annulling a patent, this writ here has been superseded by bill in equity.⁷⁶

§ 920. *Proceeding to condemn property for public use*.—A legal proceeding to condemn private property for public use is,

⁷³ 1 Chitty, Pl. (12th Am. ed.) 193-196; 2 Saunders, Pl. & Ev. 352-357; 1 Selwyn's Nisi Prius, 622-625; Davis v. Delpl't, 3 Cush. (Miss.) 445.

⁷⁴ 1 Tidd's Prac. (1807) 4; 2 ib. 982 et seq.; Pickett v. Pickett, 1 How. (Miss.) 267; Smith v. Win-

ston, 2 How. (Miss.) 601; Sims v. Nash, 1 How. (Miss.) 271.

⁷⁵ 1 U. S. Stat. at L. ch. 20, sec. 14, pp. 73-79; U. S. Rev. Stat. sec. 716; 4 Fed. Stat. Anno. 498.

⁷⁶ United States v. Stone, 2 Wall. 525 (17:765); Mowry v. Whitney, 14 Wall. 434-441 (20:858).

within the meaning of the federal constitution and judiciary acts, a suit of a civil nature at common law, and in which the parties are, in the federal courts, entitled, under the seventh amendment, to a trial of all issues of fact by a common-law jury."

"Kohl v. United States, 91 U. S. 367-379 (23:449); Searl v. School District, 124 U. S. 199 (31:416); Chappell v. United States, 160 U. S. 499-514 (40:510); Madisonville Traction Co. v. St. Bernard Min. Co., 196 U. S. 239-261 (49:462); Mississippi & R. River Boom Co. v. Patterson, 98 U. S. 403 (25:206).

CHAPTER XIX.

THE BASIS OF PROCEDURE IN SUITS AT COMMON LAW IN THE CIRCUIT AND DISTRICT COURTS OF THE UNITED STATES —LIMITATIONS UPON THE OPERATION OF "THE ACT OF CONFORMITY."

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| <p>§ 921. The complex basis of federal procedure at law.</p> <p>922. Same—Common law principles confirmed in the federal constitution.</p> <p>923. The conformity act—Its language.</p> <p>924. Same—The act restricted in its operation—Popular error concerning it.</p> <p>925. Same—Must be construed in the light of the federal constitution and laws.</p> <p>926. Same—Power of the federal courts to reject subordinate provisions of state procedure—"As near as may be."</p> <p>927. Same—Purpose of the act.</p> <p>928. Same—Act applies "in like causes" only.</p> <p>929. The personal administration of the judges not controlled by state procedure.</p> <p>930. When federal courts will not conform to state procedure—General rule.</p> <p>931. Same—When state procedure blends legal and equitable remedies.</p> <p>932. Same—Same—When state procedure permits legal actions upon equitable titles.</p> <p>933. When congress has legislated upon a matter of procedure.</p> <p>934. Service of process and ap-</p> | <p>pearance not controlled by state laws.</p> <p>§ 935. When the state procedure would defeat the lawfully-acquired jurisdiction of the court.</p> <p>936. Mode of trial not controlled by state legislation.</p> <p>937. The mode of proof controlled by federal legislation.</p> <p>938. Same—Production of documentary evidence.</p> <p>939. Manner of instructing the jury—Submitting special issues—State procedure not binding on federal courts.</p> <p>940. Jury carrying with them written evidence upon retiring from the bar.</p> <p>941. Departure in pleading under code procedure defined by the common law.</p> <p>942. Execution of judgments controlled by state law—When and how adopted.</p> <p>943. Same—"Proceedings supplementary to execution."</p> <p>944. Refusing or granting new trial not controlled by state procedure.</p> <p>945. Preparing case for review on writ of error by appellate court not controlled by state procedure.</p> <p>946. State procedure obligatory on federal courts—Subject to the above exceptions.</p> |
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§ 921. **The complex basis of federal procedure at law.**—The basis of procedure in suits at common law in the circuit and district courts of the United States is exceedingly complex, there being four distinct sources from which its rules and principles are derived, namely: (1) the federal constitution;¹ (2) the English common law;² (3) federal statutes;³ and (4) state procedure.⁴

This complexity of character in the basis of federal procedure at law arises from three causes, namely: (1) the constitutional limitations imposed upon the federal government in regard to judicial procedure, some of which are confirmatory of certain great principles of the English common law;⁵ (2) the legislation of congress, prescribing definite rules of procedure in certain specified instances;⁶ and (3) the act of conformity adopting the state practice and procedure.⁷

§ 922. **Same—Common-law principles confirmed in the federal constitution.**—Many of the great principles of the English common law, which constitute the fundamental principles of the British constitution and the guaranties of the rights and liberties of the English people, and which affect judicial procedure at almost every step, were confirmed in and preserved by the federal constitution and the amendments. Among those great principles are: the right of trial by jury in suits at common law, where the value in controversy exceeds twenty dollars, and that facts tried by a jury shall not be otherwise re-examined than according to the rules of the common law; the privilege of the writ of habeas corpus; the exemption of all persons from prosecution for a capital or otherwise infamous crime, except on presentment or indictment of a grand jury, and the right to be informed of the nature and cause of the accusation, to be con-

¹ *Scott v. Neely*, 140 U. S. 106 (35:358); *Cates v. Allen*, 149 U. S. 451 (37:804); *Scott v. Armstrong*, 146 U. S. 499 (36:1059).

² *Bennett v. Butterworth*, 11 How. 669 (13:589); *Fenn v. Holme*, 21 How. 481-488 (16:198); *Robinson v. Campbell*, 3 Wheat. 207 (4:372); *Boyle v. Zacharie*, 6 Pet. 648 (8:532).

³ *Ex parte Fisk*, 113 U. S. 713-727 (28:1117); *Whitford v. Clark*

County, 119 U. S. 522-525 (30:500); U. S. Rev. Stat. secs. 911-913; 4 Fed. Stat. Anno. 560-562.

⁴ U. S. Rev. Stat. sec. 914; 4 Fed. Stat. Anno. 563.

⁵ U. S. Const. art. III, sec. 2, cl. 3; and sec. 3; IV, V, VI, VII, and VII arts. of Amendt. to the const.

⁶ *Ex parte Fisk*, 113 U. S. 713-727 (28:1117).

⁷ U. S. Rev. Stat. sec. 914; 4 Fed. Stat. Anno. 563.

fronted with the witnesses against them; exemption from unreasonable searches and seizures; exemption from being twice put in jeopardy for the same offense; exemption from being compelled to be a witness against one's self in a criminal case; and exemption from being deprived of life, liberty, or property, without due process of law. In the enforcement and administration of these rights and guaranties, a great body of rules of procedure and definitions was developed and established by the decisions of the common law judges, and by the ancient English statutes and bills of rights; and in the administration of justice in the federal courts, resort is constantly had to those common law principles and rules, for definitions and rules of procedure.*

§ 923. **The conformity act—Its language.**—The language of the conformity act is as follows:

“The practice, pleadings, and forms and modes of proceeding

* *Brown v. Walker*, 161 U. S. 591-638 (40:819); *Counselman v. Hitchcock*, 142 U. S. 547-586 (35:1110); *Boyd v. United States*, 116 U. S. 616 (29:746); *Hale v. Henkel*, 201 U. S. 43-89 (50:652); *Nelson v. United States*, 201 U. S. 92-116 (50:673); *Lee v. United States*, 150 U. S. 476-483 (37:1150).

In *Brown v. Walker*, *supra*, Mr. Justice Brown, delivering the opinion of the court, said:

“The maxim *nemo tenetur seipsum accusare* had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon, even in England. * * * The change in the English criminal procedure in that particular seems to be founded up-

on no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly imbedded in English, as well as in American jurisprudence. * * * As the object of the first eight amendments to the constitution was to incorporate into the fundamental law of the land certain principles of natural justice which had become permanently fixed in the jurisprudence of the mother country, the construction given to those principles by the English courts is cogent evidence of what they were designed to secure and of the limitations that should be put upon them. This is but another application of the familiar rule that where one state adopts the laws of another, it is also presumed to adopt the known and settled construction of those laws by the courts of the state from which they are taken.”

in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceedings existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding.”⁹

§ 924. Same—The act restricted in its operation—Popular error concerning it.—There seems to be a great popular error in relation to the extent of the operation of the conformity act, the judicial history of the country showing that, from the time of its enactment, the legal profession has insisted that the state procedure was adopted in its entirety and in all its details, and that it controls the administration of justice in suits at common law in the federal courts in all respects, from the institution of a suit down to and including the judgment and execution. But the decisions of the supreme court of the United States, construing the act, have established many and important restrictions and limitations upon its operation, and have shown that there are many and important points in federal procedure at law which cannot be controlled by state legislation.¹⁰

§ 925. Same—Must be construed in the light of the federal constitution and laws.—The conformity act, adopting the state procedure, must be considered and construed with reference to and in the light of the federal constitution and statutes affecting procedure, and the great body of federal jurisprudence which has been built up by judicial construction of that instrument and those statutes. It must also be construed in the light of those principles of the English common-law which have been confirmed in and preserved by the federal constitution.

⁹ U. S. Rev. Stat. sec. 914; 17 U. S. Stat. at L. ch. 255, p. 197; 4 Fed. Stat. Anno. 563.

¹⁰ Nudd v. Burrows, 91 U. S. 426-444 (23:286); Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291-301 (23:898); Phelps v. Oaks, 117 U. S. 236-241 (29:888); Lamaster v. Keeler, 123 U. S. 376-391 (31:238); Re Chateaugay Ore & Iron Co., 128 U. S. 544 (32:508); Southern Pacific Co. v. Denton, 146 U. S. 202 (36:942); Shepard v.

Adams, 168 U. S. 618-627 (42:602); Luxton v. North River Bridge Co., 147 U. S. 336 (37:194); Ex parte Fisk, 113 U. S. 713 (28:1117); Whitfield v. Clark County, 119 U. S. 522 (30:500); New Orleans v. Construction Co., 129 U. S. 45 (32:607); United States Mutual Accident Association v. Barry, 131 U. S. 100-123 (33:60); Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483-492 (41:524).

It was not the intent of the conformity act to place the courts of the United States in each state, in reference to their own practice and procedure, upon the footing merely of subordinate state courts, and to require them to look to state legislation and to the decisions of the state supreme courts for authoritative rules of procedure in all its details; for, to do so, would often contravene the federal constitution and the acts of congress prescribing rules of procedure in certain specified cases.¹¹

§ 926. Same—Power of the federal courts to reject subordinate provisions of state procedure—“As near as may be.”—The conformity of federal procedure to state procedure in suits at common law, required by the act of congress, is to be “as near as may be,” and not as near as may be possible or as near as may be practicable; and it has been judicially determined that “this indefiniteness” in the language of the act did not result from inadvertence, but was the result of a legislative purpose, and that it was the intention of congress to vest in the judges of the United States a discretion in applying the law, and to give them the power to reject any subordinate provision of state procedure which, in their judgment, would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in their tribunals, and that they are expected to reject such provisions; and that, while the act of congress is, to a large extent mandatory, it is also to some extent only directory and advisory.¹²

§ 927. Same—Purpose of the act.—The purpose of the conformity act was to bring about uniformity in the law of procedure in suits at common law in the federal and state courts of the same locality, so as to relieve the lawyers practicing in both systems of courts from the necessity, burden and inconvenience of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of the two systems. It is said that the evil of two distinct systems in suits at law in the same state was a serious one, and it was the aim and purpose of the act to remove that evil; and that

¹¹ *Phelps v. Oaks*, 117 U. S. 236–241 (29:888); *Erstein v. Rothchild*, 22 Fed. R. 61–64; *Ex parte Fisk*, 113 U. S. 713–727 (28:1117).

442 (23:286); *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291–301 (23:898); *Phelps v. Oaks*, 117 U. S. 236–241 (29:888); *O’Connell v. Reed*, 5 C. C. A. 586.

¹² *Nudd v. Burrows*, 91 U. S. 426–

was accomplished by bringing about the conformity in the courts of the United States which the act prescribes—that is, conformity, “as near as may be,” in suits at common law, “to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which” the federal court is held.¹³

§ 928. **Same—Act applies “in like causes” only.**—The conformity act can be invoked only in suits at common law, and then only “in like causes.” If a suit at law arise in a federal court, and under federal law, and there be a suitable procedure which was established and settled in the federal courts before the passage of the conformity act, and if there be no “like causes” known to the law of the state, then the state procedure will not be followed, but the federal court will be guided by the procedure established in such cases before the conformity act; and, accordingly, in a suit *in rem*, in the circuit court of the United States for the district of Kentucky, by the United States, for the forfeiture of property, after its seizure, for a violation of the revenue laws of the United States, it was held that the state procedure did not apply and could not be invoked, because there are no “like causes” known to the laws of Kentucky.¹⁴

§ 929. **The personal administration of the federal judges not controlled by state procedure.**—Congress did not intend, in the adoption of the conformity act, that the state procedure should control the federal judges in their personal conduct and administration of their duties, and the exercise of their common law powers, while sitting upon the bench and presiding over trials. The personal administration of the judge in the discharge of his separate functions is neither practice, pleading, nor a form or mode of proceeding within the meaning of those terms, as used in the act. And it has, accordingly, been held, from the first, that state statutes prescribing the duties of the judges while presiding over trials, such, for instance, as the manner

¹³ Nudd v. Burrows, 91 U. S. 426–442 (23:286); Indianapolis & St. Louis Railroad Co. v. Horst, 93 U. S. 291–301 (23:898); O’Connell v. Reed, 5 C. C. A. 586.

¹⁴ Coffey v. United States, 117 U. S. 233–235 (29:890).

The general rules of pleading in admiralty suits *in rem* apply to suits *in rem* for a forfeiture, brought by the United States after a seizure on land. Coffey v. United States, *supra*, and authorities cited.

of instructing the jury, requiring special issues to be submitted and special verdicts to be returned, and defining what papers the jury may carry with them upon retiring from the bar, are not binding upon the federal judges.¹⁵

§ 930. When federal courts will not conform to state procedure—General rule.—The federal courts will not conform to state procedure, when to do so would contravene any provision of the federal constitution, or impair any right conferred, or conflict with any inhibition, imposed by that instrument, or by the laws of the United States; nor when it would conflict with any law of congress defining the jurisdiction of the federal courts; nor when it would contravene any definite rule of procedure, prescribed by a federal statute; nor when it would unwisely encumber the administration of the law, or tend to defeat the ends of justice, in the federal tribunals; nor when the state law prescribing procedure is inconsistent with the terms, or would tend to defeat the purpose, or impair the effect, of any legislation of congress.¹⁶

§ 931. Same—When state procedure blends legal and equitable remedies.—The federal constitution having established the distinction between law and equity, and between legal and equitable causes of action, and imposed the requirement that legal and equitable remedies must be separately pursued, the federal courts will not, and cannot, conform to those rules and statutes of state procedure which authorize legal and equitable claims and legal and equitable remedies to be blended together in one suit. A party who claims a legal title, suing in the federal court, must proceed at law, and may proceed according to the forms of practice in such cases in the state court; but if

¹⁵ *Nudd v. Burrows*, 91 U. S. 426-442 (23:286); *Indianapolis & St. Louis Railroad Co., v. Horst*, 93 U. S. 291-301 (23:898); *United States Mutual Accident Association v. Barry*, 131 U. S. 100-123 (33:60); *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483-492 (41:524).

¹⁶ *Scott v. Neely*, 140 U. S. 106-117 (35:358); *Cates v. Allen*, 149 U. S. 451-465 (37:804); *Bennett v. Butterworth*, 11 How. 669 (13:859); *Scott v. Armstrong*, 146 U.

S. 499 (36:1059); *Hipp v. Babin*, 19 How. 271 (15:633); *Thompson v. R. Co.*, 6 Wall. 134 (18:965); *Whitehead v. Shattuck*, 138 U. S. 146-156 (34:873); *Southern Pacific Co. v. Denton*, 146 U. S. 202-210 (36:942); *Whitford v. Clark County*, 119 U. S. 522-525 (30:500); *Ex parte Flisk*, 113 U. S. 713 (28:1117); *Luxton v. North River Bridge Co.*, 147 U. S. 337 (37:194); *Chappelle v. United States*, 160 U. S. 499-514 (40:510).

his claim be an equitable one he must proceed in equity, and according to the equity system of procedure recognized in the federal courts.¹⁷

§ 932. Same—Same—When state procedure permits legal actions upon equitable titles.—The federal courts do not and cannot, for constitutional reasons, conform to those rules of state procedure which permit legal actions to be brought and maintained upon equitable titles,¹⁸ and allow equitable defenses to be interposed to purely legal actions.¹⁹

§ 933. When congress has legislated upon a matter of procedure.—When congress has legislated upon any matter of practice, pleadings, or procedure, and has prescribed a definite rule for the government of its courts in suits at common law, such legislation is exclusive of all state laws and rules upon the subject; and in every case, the provisions of the conformity act must give way and be disregarded, when the adoption of the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect of any legislation of congress.²⁰

§ 934. Service of process and appearance not controlled by state laws.—It is a firmly established principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of a defendant, except by actual service of notice within the jurisdiction of the court upon him, or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service.

¹⁷ Scott v. Neely, 140 U. S. 106-117 (35:358); Cates v. Allen, 149 U. S. 451-465 (37:804); Bennett v. Butterworth, 11 How. 669 (13:859); Hurt v. Hollingsworth, 100 U. S. 100-104 (25:569).

¹⁸ Fenn v. Holme, 21 How. 481-488 (16:198); Hooper v. Schelmer, 23 How. 235-249 (16:452); Shelburn v. de Cordora, 24 How. 423-426 (16:741); Langdon v. Sherwood, 124 U. S. 74-85 (31:344); Redfield v. Parks, 132 U. S. 239-252 (33:327); Johnson v. Christian, 128 U. S. 374, 382 (32:412); Richardson v. L. & N. R. Co., 169 U. S. 128 (42:687); Kercher v.

Murray, 60 Fed. R. 52; Lockhart v. Johnson, 181 U. S. 516-530 (45:979); Foster v. Mora, 98 U. S. 425-428 (25:191); Sweatt v. Burton, 42 Fed. R. 286.

¹⁹ Scott v. Armstrong, 146 U. S. 499-513 (36:1059).

²⁰ Southern Pacific Co. v. Denton, 146 U. S. 202-210 (36:942); Whitford v. Clark County, 119 U. S. 522-525 (30:500); Ex parte Fisk, 113 U. S. 713 (28:1117); Luxton v. North River Bridge Co., 147 U. S. 337 (37:194); Chappelle v. United States, 160 U. S. 499-514 (40:510).

The rule applies to corporations, as well as to natural persons; and the federal courts will not recognize as valid service of process, in a personal action against a corporation, which is neither incorporated nor doing business within the state, nor has an agent there, by service upon its president while temporarily in the state, although such service be authorized by the state law.²¹ And a state statute which gives to a special appearance, made to challenge the court's jurisdiction, the force and effect of a general appearance, so as to confer jurisdiction over the person of the defendant, is not binding upon the federal courts, and will not be conformed to by them.²² It has been held that, under the federal statute²³ authorizing the circuit and district courts to make rules and orders directing the returning of writs and processes, a rule of a district court of the United States for the issue, service and return of original process upon the institution of an action at law need not conform strictly to the statutes of the state regulating such matters, but, in the adoption of such rule, the court could properly exercise a discretion.²⁴

§ 935. When the state procedure would defeat the lawfully-acquired jurisdiction of the court.—It was not the intent of the conformity act, that the statutes of the state prescribing rules of practice, pleadings and proceedings should be adopted and observed by the federal courts when to do so would have the effect of defeating the jurisdiction of those courts when it has attached and been lawfully acquired under the legislation of congress. The jurisdiction of the circuit courts of the United States has been defined and limited by the acts of congress, and can be neither restricted nor enlarged by the statutes of a state.²⁵

§ 936. Mode of trial not controlled by state legislation.—The constitution and statutes of the United States have prescribed,

²¹ *Goldy v. Morning News*, 156 U. S. 518-526 (39:517); *New Mexico ex rel. Caledonia Coal Co. v. Baker*, 196 U. S. 432-446 (49:540).

²² *Galveston, Harrisburg & San Antonio R. Co. v. Gonzales*, 151 U. S. 496-520 (38:248); *Southern Pacific R. Co. v. Denton*, 146 U. S. 202 (36:942); *Mexican Cent. R.*

Co. v. Pinkney, 149 U. S. 194 (37:699).

²³ U. S. Rev. Stat. sec. 918.

²⁴ *Shepard v. Adams*, 168 U. S. 618-627 (42:602).

²⁵ *Phelps v. Oaks*, 117 U. S. 236-241 (29:888); *Southern Pacific R. Co. v. Denton*, 146 U. S. 202-210 (36:942).

fixed and established the modes or methods of trial in suits at common law, in the federal district and circuit courts, and those modes are absolutely exclusive, and can neither be taken away, nor modified, nor changed, in any manner, whatever, by state constitutions and laws.²⁶

§ 937. The mode of proof controlled by federal legislation.—“The mode of proof, in the trial of actions at common law,” in the district and circuit courts of the United States, is controlled exclusively by federal legislation.²⁷ The federal statute declares that the mode of proof “shall be by the oral examination of witnesses in open court,” except that in certain specified instances or contingencies the depositions of witnesses may be taken and read upon the trial;²⁸ and every action at law in a court of the United States must, as to the mode of proof, be governed by the rule, or by the exceptions to it which the statute provides, and the courts are not at liberty to adopt exceptions made by state statutes, nor have they the power to require litigants to conform to them.²⁹ And it has been accordingly

²⁶ U. S. Const. VII Amendt.; U. S. Rev. Statutes, Secs. 566, 648, 649, 700, 861; *Parsons v. Bedford*, 3 Pet. 433-458 (7:732); *Hodges v. Easton*, 106 U. S. 408-413 (27:169); *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485-511 (27:337); *Capital Traction Co. v. Hof*, 174 U. S. 1-46 (43:873); *United States v. Wonson*, 1 Gal. 5-20, Fed. Cas. 16,750; *Bank of Hamilton v. Dudley*, 2 Pet. 492-526 (7:496); *Chappell v. United States*, 160 U. S. 499-514 (40:510); *United States v. Rathbone*, 2 Paine, 578; *Howe Mach. Co. v. Edwards*, 15 Blatchf. 402, Fed. Cas. No. 6,784; *Swift & Co. v. Jones*, 145 Fed. R. (C. C. A.) 489; *Ex parte Fisk*, 113 U. S. 713-727 (28:1117); *Hanks Dental Association v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:989).

²⁷ *Ex parte Fisk*, 113 U. S. 713-727 (28:1117); *Hanks Dental Association v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:

989); *United States v. 50 Boxes & Packages of Lace*, 92 Fed. R. 601; *National Cash Register v. Leland*, 77 Fed. R. 242, 37 C. C. A. 372, 94 Fed. R. 502; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. R. 953; *Shellabarger v. Oliver*, 64 Fed. R. 306; *Taber v. Indianapolis Journal Newspaper Co.*, 66 Fed. R. 423; *Seeley v. Kansas City Star Co.*, 71 Fed. R. 556; *Despaux v. Pennsylvania R. Co.*, 81 Fed. R. 897; *Zych v. American Car & Foundry Co.*, 127 Fed. R. 728; *Mulcahey v. Lake Erie & W. W. R. Co.*, 69 Fed. 172.

²⁸ U. S. Rev. Stat. 861, 866, 867; 3 Fed. Stat. Anno. 8-23; U. S. Comp. Stat. 1901, pp. 661-664.

²⁹ *Ex parte Fisk*, 113 U. S. 713-723 (28:1117); *Hanks Dental Association v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:989); *National Cash Register v. Leland*, 77 Fed. R. 242, 37 C. C. A. 372, 94 Fed. R. 502.

held, and is now firmly established, that a state statute which provides that the deposition of a party to an action pending in a court of record, or of a person who expects to be a party to an action about to be brought, may be taken at his own instance, or at the instance of an adverse party, or of a co-plaintiff or codefendant, at any time before trial, is in conflict with section eight hundred and sixty-one of the Revised Statutes of the United States, prescribing the mode of proof in the trial of actions at common law, and is not within any of the exceptions to the rule therein prescribed, and that such state statute is wholly inoperative in the federal courts, and those courts are without power to compel parties to conform to its provisions; and this rule was not changed by the act of congress, approved March 9, 1892, providing, "that, in addition to the mode of taking depositions of witnesses in causes pending at law or in equity in the district and circuit courts of the United States, it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the state in which such courts are held," the purpose and effect of that act being not to enlarge the exceptions, established by previous federal legislation, to the rule requiring oral testimony and examination of witnesses in open court, in actions at common law, but to allow depositions *de bene esse* to be taken under the state practice where depositions of witnesses are allowed under the exceptions established by the previous legislation of congress.³⁰

• § 938. **Same—Production of documentary evidence.**—The fifteenth section of the original judiciary act provides a definite rule governing the compulsory production of books and writings in evidence by the parties to actions at law in the district and circuit courts of the United States;³¹ and that rule controls to the exclusion of all state legislation upon the subject,³² upon the principle, which is of universal application, that whenever congress has legislated upon any matter of practice, and prescribed a definite rule for the government of its own courts,

³⁰ *Ex parte Fisk*, 113 U. S. 713-723 (28:1117); *Hanks Dental Association v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:898).

³¹ U. S. Rev. Stat. Sec. 724; 1 U.

S. Stat. at L. ch. 20, sec. 15, p. 82; 3 Fed. Stat. Anno. 2, 3; U. S. Comp. Stat. 1901, p. 583.

³² *United States v. National Lead Co.*, 75 Fed. R. 94; *Gregory v. Chicago, R. Co.*, 10 Fed. R. 529.

it is to that extent exclusive of the legislation of the state upon the same matter.³³

§ 939. Manner of instructing the jury—Submitting special issues—State procedure not binding on federal courts.—State statutes directing the manner or mode in which the judges presiding in common law jury trials in the state courts shall instruct the jury are not within the intent and purview of the act of conformity, and are, therefore, not binding on the federal judges in the trial of like causes in the United States circuit courts.³⁴ Neither are the federal judges bound by state statutes requiring the submission to the jury special issues or questions of fact, to be answered and returned in connection with their general verdict.³⁵

§ 940. Jury carrying with them written evidence upon retiring from the bar.—At common law, the jury, upon retiring from the bar to consider the case and make up their verdict, could not carry with them any written evidence submitted in the cause, without the consent and direction of the court, and then only such written or documentary evidence as was under seal, and the exemplification of the testimony of witnesses taken in chancery, if such witnesses were dead at the time of the trial;³⁶ and it is settled that a state statute directing what papers read in evidence on the trial shall or may be carried from the bar by the jury is not binding upon federal judges presiding in trials at common law in the circuit and district courts of the United States.³⁷

§ 941. Departure in pleading under code procedure defined by the common law.—In the administration of justice under the code procedure, or other statutory state procedure, by which amendments are liberally allowed, it is frequently necessary, for the purpose of applying the statute of limitations, for the court to ascertain and determine whether an amended pleading filed in a cause constitutes a departure in pleading, and states

³³ *Southern Pacific R. Co. v. tual Accident Association v. Bar-*
Denton, 146 U. S. 202-210 (36: ry, 131 U. S. 100-123 (33:60);
942); *Ante Sec. 930.* *Grimes Dry Goods Co. v. Malcolm,*

³⁴ *Nudd v. Burrows*, 91 U. S. 164 U. S. 483-492 (41:524).
426-442 (23:286). ³⁶ *Offit v. Vick, Walker (Miss.)*

³⁵ *Indianapolis & St. Louis Rail-* *R. 99; 2 Tidd's Prac. (1807) 795.*
road Co. v. Horst, 93 U. S. 291- ³⁷ *Nudd v. Burrows*, 91 U. S.
301 (23:898); *United States Mu-* 426-442 (23:286).

a new cause of action or defense; and the question thus presented must be determined by the rules of the common law.³⁸

A departure in pleading is said to be when a party quits or departs from the case or defense which he has first made, and has recourse to another; it occurs when the replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. A departure may be either in the substance of the action or defense, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom or act of parliament.³⁹

It is firmly established that, if the court, looking to the rules of the common law, determines that, an amended petition filed under the code procedure, or other statutory procedure, is a departure in pleading, stating a new cause of action, and the statute of limitations has been interposed as a defense, it allows the operation of the statute against the new cause of action up to the time the amendment was actually filed. The rule is that, while a new cause of action may, under the modern procedure, be set up and sued upon by an amended petition or complaint, the defense of the bar of the statute of limitations is as available to the defendant as if the amendment were a new and independent suit, and the filing of the amendment cannot have relation back to the time of the commencement of the suit, so as to avoid the bar of the statute.⁴⁰

§ 942. Execution of judgments controlled by state laws—When and how adopted.—It is the settled doctrine of the supreme court of the United States, evidenced by a long and unbroken line of decisions, that congress, and the courts of the

³⁸ *Union Pacific R. Co. v. Wyler*, 154 U. S. 285-298 (39:983).

³⁹ 1 Chitty, Pl. (12th Am. ed.) 644-646; Stephen's Pl. (Philadelphia ed. 1824) 405-411; 1 Tidd's Practice (1807) 638 et seq.

⁴⁰ *Union Pacific R. Co. v. Wyler*, 154 U. S. 285-298 (39:983); *Box v. Ry. Co.*, 107 Iowa 667, 78 N. W. 696; *Bigham v. Talbot*, 63 Texas, 271; *Roberson v. McIlhenny*, 59 Texas, 615; *South Carolina R. Co. v. Nix*, 68 Ga. 572; *Mohr v. Lemle*,

69 Ala. 180; *Flatley v. Memphis & Charleston R. Co.*, 9 Heisk. (Tenn.) 230; *Exposition Cotton Mills v. Western & A. R. Co.*, 83 Ga. 441; *Bolton v. Georgia Pacific R. Co.*, 83 Ga. 659; *Alabama G. S. R. Co.*, 81 Ala. 229; *Toby v. Allen*, 3 Kan. 399; *Atlantic & Pac. R. Co. v. Laird*, 58 Fed. R. 760; *Kansas City v. Hart*, 60 Kan. 692, 57 Pac. R. 941; *Phoenix Lumber Co. v. Houston Water Co.*, 94 Texas, 463, 61 S. W. 707; *Cotton v. Rand*, 93

United States acting under its authority, have the power, under the constitution, to adopt the laws of the several states providing writs and remedies for the execution of judgments in common-law cases, and all proceedings upon such writs and remedies.⁴¹ There has been frequent legislation upon this subject by congress, but the law now in force, adopting state remedies upon judgments, is embraced in the sixth section of the act of June 1, 1872, "to further the administration of justice," now section 916 of the United States Revised Statutes, which took effect as of December 1, 1873,⁴² and is as follows:

"The party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies on the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court; and such courts may, from time to time, by general rules, adopt such state laws as may hereafter be in force in such states in relation to remedies upon judgments, as aforesaid, by execution or otherwise."⁴³

This statute adopts (1) the state remedies "*now provided* in like causes by the laws of the states"—that is at the time section 916 of the United States Revised Statutes was passed or re-enacted upon the revision, or (2) state remedies provided by state laws "*hereafter enacted*"—that is after the enactment of said section 916—by the states, "which may be adopted by general rules of such circuit or district courts;" and state remedies upon judgments provided by state laws enacted since December 1, 1873, when the United States Revised Statutes went into effect, cannot be availed of nor resorted to by parties recovering common-law judgments in the federal circuit and dis-

Texas 25, 51 S. W. 838; *Landa v. Obert*, 78 Texas, 33, 14 S. W. 297; *Woods v. Huffman*, 64 Texas, 98; *Moralis*, 66 Texas, 189; *Windom v. Howard*, 86 Texas, 505.

⁴¹ *Wayman v. Southard*, 10 Wheat. 1-50 (6:253); *Ex parte Boyd*, 105 U. S. 647-658 (26:1200), (where the authorities are all cited in the opinion); *Cook v. Avery*, 147 U. S. 375-386 (37:209).

⁴² *Ex parte Boyd*, 105 U. S. 647-658 (26:1200); *Canal and Claborn Streets R. R. Co. v. Hart*, 114 U. S. 653-654 (29:226); *Lamaster v. Keeler*, 123 U. S. 376-391 (31:238).

⁴³ 17 U. S. Stat. at L., ch. 255, Sec. 6, p. 196; U. S. Rev. Stat. Sec. 916, 4 Fed. Stat. Anno. 580, U. S. Comp. Statutes 1901, p. 684.

strict courts, unless such remedies have been "adopted by general rules" of such courts, but will be confined to those remedies provided by state laws in force when the Revised Statutes went into effect.⁴⁴

§ 943. Same—"Proceedings supplementary to execution."—Parties recovering judgments in common-law causes in the federal circuit and district courts are entitled to the benefit of "proceedings supplementary to execution," prescribed and authorized by state statutes, in which, upon an execution issued upon a judgment at law and returned unsatisfied, in whole or in part, among other things, the judgment debtor is required to submit to an examination under oath, for the discovery of his assets, property or choses in action, or due to him or held in trust for him, in order that they may be applied to the satisfaction of the judgment. Such an examination of the judgment debtor, under oath, for the discovery of his assets, is not a proceeding of equitable jurisdiction, as that jurisdiction was known and defined in the laws of England at the time of the adoption of the federal constitution, and forms no part of the equity jurisdiction which was, by that instrument, vested in the courts of the United States; and, therefore, such proceeding is properly exercised by the federal circuit and district courts, sitting as courts of common law. There was no jurisdiction in the high court of chancery of England to entertain a naked bill against a judgment debtor for a discovery of his assets, and the proceeding is purely statutory.⁴⁵

§ 944. Refusing or granting new trial not controlled by state procedure.—It has long been the established law in the courts of the United States, that to grant or refuse a new trial in an action at law rests in the sound discretion of the court to which the motion is addressed, and the action of the court upon the motion cannot be reviewed upon writ of error; the refusal to grant a new trial cannot be assigned as error in an appellate court. This rule was not abrogated by the conformity act, and in passing upon motions for new trials the federal courts are in no wise controlled by state laws and rules.⁴⁶

⁴⁴ *Lamaster v. Keeler*, 123 U. S. 376-391 (31:238); *Cook v. Avery*, 147 U. S. 375-386 (37:209).

658 (26:1200); *Sage v. Ry. Co.*, 47 Fed. R. 4.

⁴⁶ *Newcomb v. Wood*, 97 U. S.

581-584 (24:1085); *Coffey v. Unit-*

⁴⁵ *Ex parte Boyd*, 105 U. S. 647-

§ 945. Preparing case for review on writ of error by appellate court not controlled by state procedure.—The rules of practice and procedure in the state courts have no application to proceedings in the federal trial courts, taken for the purpose of reviewing, upon writ of error in the appellate courts, the judgments of such trial courts. The making of objections and reserving exceptions upon the trial, and the preparation, perfecting, settling and signing bills of exceptions, and whatever else is necessary to be done in the trial court, in order that its action or ruling upon any particular question or matter may be reviewed or revised upon writ of error, must be done in accordance with the acts of congress, and the rules prescribed by the appellate courts, and such other rules as have been announced or recognized in the decisions of the federal supreme court as essential in the administration of justice.⁴⁷

§ 946. State procedure obligatory on the federal courts—Subject to the above exceptions.—Subject to the exceptions, limitations and restrictions, stated in this chapter, and, perhaps, a few others not here enumerated, the act of conformity is

ed States, 117 U. S. 235 (29:891); *Missouri, Pacific R. Co. v. The Chicago & Alton R. Co.*, 132 U. S. 191-192 (33:309); *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291 (23:898).

⁴⁷ *Ex parte Chateauguay Ore & Iron Co.*, 128 U. S. 544-557 (32:508); *St. Clair v. United States*, 154 U. S. 134-155 (38:936); *Lincoln v. Power*, 151 U. S. 436-443 (38:224); *Francisco v. Chicago & A. R. Co.*, 79 C. C. A. 292-298; *Boogher v. Life Ins. Co.*, 103 U. S. 90-98 (26:310).

In delivering the opinion of the court in one of the cases cited, Sanborn, circuit judge, said:

"But the power and practice of the national appellate courts and the means of reviewing the judgments of the circuit and district courts therein are neither conditioned, affected, or controlled by the statutes of the states, the prac-

tice of these courts, or the act of conformity.. Section 914 is limited by its express terms to the practice and proceedings in the circuit and district courts to procure their judgments. It has no application to the practice or proceedings of the federal appellate courts, or to any matters relating to bills of exceptions, motions for new trials, or any other means adopted to review the judgments of the circuit or district courts. The power and practice of the federal appellate courts are derived exclusively from the constitution, the acts of congress, the common law, the ancient English statutes, and the rules and practice of the courts of the United States; and they may not be extended, diminished, controlled, or affected by the statutes of the states or the practice of their courts." 79 C. C. A. 296-297.

mandatory, and the state practice and procedure is obligatory upon the federal district and circuit courts; and parties litigant in those courts are entitled to the advantage of all the remedies given by the state law, and to have them administered in the due and established course of judicial procedure.⁴⁸

⁴⁸ *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23:898); *Amy v. City of Watertown*, 130 U. S. 301-320 (32:946); *Albany and Rensselaer Iron & Steel Co. v. Lundberg*, 121 U. S. 451-457 (30:982); *Southern Pacific Co. v. Denton*, 146 U. S. 202-210 (36:942); *Roberts v. Lewis*, 144 U. S. 653-658 (36:579); *Ex parte Boyd*, 105 U. S. 647-658 (26:1200).

CHAPTER XX.

THE VENUE OF SUITS IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 947. Suits are local or transitory.</p> <p>948. The venue of suits in the federal courts regulated by federal statute.</p> <p>949. Suit must be brought in the state of which the defendant is a citizen and in the district whereof he is an inhabitant—General rule—Exceptions.</p> <p>950. Same—Citizenship and residence of corporations.</p> <p>951. Venue when the jurisdiction is founded on the diversity of the citizenship of the parties.</p> <p>952. Same—When there are more plaintiffs or defendants than one.</p> <p>953. Same—Suits against national banks.</p> <p>954. Venue of suits against aliens and alien corporations.</p> <p>955. Venue of local suits.</p> <p>956. Same—Not necessary that plaintiff or defendant shall be an inhabitant of the district where suit is brought.</p> | <p>§ 957. Same—Suit to remove cloud from shares of stock in a corporation.</p> <p>958. Same — Trespass <i>quare clausum fregit</i>.</p> <p>959. Special acts regulating venue in particular districts.</p> <p>960. Venue of suits of which federal courts have exclusive jurisdiction not controlled by general judiciary act.</p> <p>961. Same—Venue of suits for infringement of letters patent.</p> <p>962. Same—Venue of suits under federal statute to protect commerce.</p> <p>963. Same—Venue of actions for damages under the federal anti-trust act—Where defendant resides or is found.</p> <p>964. Venue of suits for pecuniary penalties and forfeitures.</p> <p>§ 965. Venue of suits for internal revenue taxes.</p> <p>966. Venue of suits by national banks to enjoin comptroller of the currency.</p> |
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§ 947. Suits are local or transitory.—Suits at common law were either local or transitory, and the venue was laid accordingly;¹ and this distinction has been recognized and preserved

¹ Tidd's Prac. (1807) 369; 1 Chitty, Pl. (12th Am. Ed.) 267-271; Doulson v. Matthews, 4 Term (Dunford & East) R. 503; Roach

in the legislation of congress prescribing the venue of suits in the federal courts, and also in the decisions.²

§ 948. The venue of suits in the federal courts regulated by federal statutes.—The venue of suits of a civil nature in the circuit courts of the United States is regulated and controlled by federal statutes, and not by state legislation.³ This object is effected by statutes of general application,⁴ and also by some special statutes applicable only to the circuit courts in particular states or districts.⁵ It is possibly true that section 740 of the United States Revised Statutes was repealed by the present judiciary act, but it has not been so declared by the courts.⁶

§ 949. Suit must be brought in the state of which the defendant is a citizen and in the district whereof he is an inhabitant—General rule—Exceptions.—The general rule in regard to the venue of suits in the circuit courts of the United States, established by the first section⁷ of the judiciary act now in force is that, every suit brought against any person, in any circuit court of the United States, by any original process or proceeding, must be brought in the state of which the defendant is a citizen, and in the judicial district in which he resides and of which he is an inhabitant.⁸ But to this general rule there are four exceptions; that is to say, there are four classes of cases not governed by the rule, namely: the rule does not apply (1) where the jurisdiction of the circuit court is founded only on the fact that the action is between citizens of different states; nor (2) where the suit is brought against an alien, or against a

v. Damron, 2 Humph. (Tenn.) 427; *Watts v. Kinney*, 6 Hill (N. Y.) 82; *Elder v. Hilzheim*, 6 George (Miss.) 231.

² *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *McKenna v. Flisk*, 1 How. 241-249 (11:117); *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105-108 (39:913); *Stone v. United States*, 167 U. S. 178-169 (42:127); *Schulenberg v. Harriman*, 21 Wall. 44-65 (22:551); *Casey v. Adams*, 102 U. S. 66-68 (26:52).

³ *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U. S. 496-520 (38:248); *Southern*

Pacific Co. v. Denton, 146 U. S. 202-210 (36:942).

⁴ U. S. Rev. Stat. Secs. 74, 742; 25 U. S. Stat. at L., ch. 866, sec. 1, p. 434; 18 U. S. Stat. at L., ch. 137, Sec. 8, p. 472.

⁵ *Petri v. Creelman Lumber Co.*, 199 U. S. 487-501 (50:281).

⁶ *Petri v. Creelman Lumber Co.*, 199 U. S. 487-501 (50:281).

⁷ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 433.

⁸ *Re Keasby & Mattison Co.*, 160 U. S. 221-231 (40:402); *McCormick Harvesting Machine Co. v. Walther*, 134 U. S. 41-45 (33:833).

corporation created by a foreign state, empire or kingdom; nor (3) where the suit is one of which the circuit courts of the United States have exclusive original jurisdiction; nor (4) where the suit is one of a local nature. The rules controlling the classes of cases embraced in these exceptions to the general rule will be stated in subsequent sections of this chapter.

§ 950. Same—Citizenship and residence of corporations.—A corporation created by one of the states of the Union is, within the meaning of the judiciary act, a citizen and an inhabitant of the state which created it, and is an inhabitant and resident of the judicial district in which its principal offices are situated, its books kept, and its general corporate business is transacted; and if there be two or more judicial districts in the state and it transacts business in all of them, still it must be considered as an inhabitant and resident only of the district where its general offices are located, and, unless it be within some exception to the general rule as above stated, every civil suit by original process or proceeding brought against such corporation must be brought in the state of its creation and in the judicial district where its general offices are located and its general corporate business is transacted.⁹ And a corporation does not waive its right to be sued alone in the state which created it, by having and maintaining a usual place of business in another state in which it has not been incorporated.¹⁰

§ 951. Venue when the jurisdiction is founded on the diversity of the citizenship of the parties.—The first section of the judiciary act contains a proviso to the general provision defining the venue, which proviso is as follows: "But where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or defendant."¹¹

Under this proviso, which is an exception to the general rule above stated, every suit brought against any person, in any circuit court of the United States, by any original process or proceeding, where the jurisdiction of the court is based on the

⁹ *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U. S. 496-520 (38:248).

(36:942); *Re Keasby & Mattison Company*, 160 U. S. 221-231 (40:402).

¹⁰ *Ex parte Shaw*, 145 U. S. 444-453 (36:768); *Southern Pacific Co. v. Denton*, 146 U. S. 202-210

¹¹ 25 U. S. Stat. at L., ch. 866, sec. 1, p. 343

fact that the action is between citizens of different states, must be brought in the state of which the plaintiff is a citizen, and in the judicial district of which he is an inhabitant and a resident; or it must be brought in the state of which the defendant is a citizen, and in the judicial district of which he is an inhabitant and a resident.¹²

§ 952. Same—When there are more plaintiffs or defendants than one.—When there are more plaintiffs or defendants than one, all of the plaintiffs must be competent to sue, and all of the defendants must be liable to be sued in the particular action. There must be diversity of citizenship between all the plaintiffs and all the defendants; and the suit cannot be brought in the state and district of the citizenship and residence of one of the plaintiffs unless it be that of all the plaintiffs, nor can it be brought in the state and district of the citizenship of one of the defendants, unless it be that of all the defendants.¹³

But where there are two plaintiffs who are citizens of different states, and there is one defendant who is a citizen of a third state, the suit may be maintained in the state and district of the residence and citizenship of the defendant; it is not necessary in such case that the two plaintiffs should be citizens of the same state.¹⁴

§ 953. Same—Suits against national banks.—Under existing legislation, all national banking associations established under the laws of the United States are, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts have no jurisdiction other than such as they would have if such banks were organized under state laws.¹⁵

¹² *Ex parte Wisner*, 203 U. S. 449-461 (51:264); *Ex parte Shaw*, 145 U. S. 444-453 (36:768); *Southern Pacific Co. v. Denton*, 146 U. S. 202-210 (36:942); *McCormick Harvesting Machine Co. v. Walthers*, 134 U. S. 41-45 (33:833); *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U. S. 496-520 (38:248).

¹³ *Smith v. Lyon*, 133 U. S. 315-320 (33:635); *Hoe v. Jamieson*,

166 U. S. 395-396 (41:1049); *Re Keasby & Mattison Co.*, 160 U. S. 221-231 (40:402).

¹⁴ *Sweeney v. Carter Oil Co.*, 199 U. S. 252-259 (50:178).

¹⁵ 22 U. S. Stat. at L., ch. 290, sec. 4, p. 162; 25 U. S. Stat. at L., ch. 866, sec. 4, p. 434; *Leather Mfg. National Bank v. Cooper*, 120 U. S. 778-784 (30:816); *Whitmore v. Amoskeag National Bank*, 134 U. S. 527-530 (33:1002); *Petri v. Com-*

§ 954. Venue of suits against aliens and alien corporations.—

The provisions of the judiciary act prescribing the venue of suits in the circuit courts of the United States evidently contemplated those persons, and those persons only, who are citizens of some state of the union, and are inhabitants of some judicial district in one of the states, and those provisions of the law are manifestly inapplicable to a suit brought by a citizen of one of the United States against an alien, or against a corporation created by a foreign state. To construe those provisions as applicable to such suits would be to open the courts of the United States to aliens and alien corporations against citizens, and to close them to citizens against aliens and alien corporations. And the rule is now established that suits by citizens of the states against aliens and alien corporations may be brought in any circuit court of the United States where the defendant may be found at the time of the service of the process, and service upon the financial agent of an alien corporation within the jurisdiction of the court is a sufficient service upon the corporation.¹⁶

§ 955. Venue of local suits.—All suits brought in the circuit courts of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property are local suits, and must be brought in the judicial district in which the property is situated; and if the property which is the subject-matter of the suit is situated partly in one district and partly in another, within the same state, the suit may be brought in the circuit court of either district, and the court in which the suit is brought shall have jurisdiction to decide it, and to cause its mesne or final process to be issued and executed, as fully as if the property were wholly within the district for which such court is constituted.¹⁷

mercantile National Bank of Chicago, 142 U. S. 644-651 (35:1144); *Ex parte Jones*, 164 U. S. 691-694 (41:601).

¹⁶ *Re Hohorst*, 150 U. S. 653-654 (37:1211); *Barrow Steamship Co. v. Kane*, 170 U. S. 100-113 (42:-964).

¹⁷ U. S. Rev. Stat. sec. 742; 18

U. S. Stat. at L. ch. 137, sec. 8, pp. 470-473; 4 Fed. Stat. Anno. 380-381; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352-371 (33:178); *Greely v. Lowe*, 155 U. S. 58-76 (39:69); *Dick v. Foraker*, 155 U. S. 404-416 (39:201); *Arndt v. Griggs*, 134 U. S. 316-329 (33:918); *Jellenik v. Huron Mining*

§ 956. Same—Not necessary that plaintiff or defendant should be an inhabitant of the district where suit is brought.—In local suits the situs of the property determines the judicial district where the suit shall be brought; and if the requisite diversity of citizenship exists, and the jurisdictional amount is involved, the court where the property is situated has jurisdiction of the suit, although neither the plaintiff nor defendant is an inhabitant of or resides in the district, nor is a citizen of that state. The provisions of the general judiciary act, requiring that suits shall be brought in the district of which the defendant is an inhabitant, or in the district of which either the plaintiff or defendant is an inhabitant, and in which he resides, has no application to local suits of the character above mentioned. All of the parties, both plaintiffs and defendants, may be non-residents of the state where the property is situated, and yet the court will have jurisdiction if diversity of citizenship exists.¹⁸

§ 957. Same—Suit to remove cloud from shares of stock in a corporation.—Where a state statute provides that the stock of corporations created by that state shall be deemed personal property, transferable on the books of the company, such stock is situated within the state within the meaning of the acts of congress defining the venue of local suits, and a suit to remove a cloud from the title of such stock, and to determine its ownership, is a local suit, and should be brought in the state which created the corporation, and in the judicial district where its principal office is situated.¹⁹

§ 958. Same—Trespass quare clausum fregit.—An action to recover damages for trespass upon land, such as digging, excavating and removing the soil, and felling and carrying away timber, is, like an action to recover the title and possession of the land itself, a local action, and can be brought only in the state and in the judicial district in which the land lies.²⁰ But

Co., 177 U. S. 1-14 (44:647); Citizens' Savings & Trust Co. v. Illinois Central Railroad Co., et al., 205 U. S. 46-59 (51:708).

¹⁸ Dick v. Foraker, 155 U. S. 404-416 (39:201); Citizens' Savings & Trust Co. v. Illinois Cen-

tral Railroad Company et al, 205 U. S. 46-59 (51:708).

¹⁹ Jellenik v. Huron Copper Mining Co., 177 U. S. 1-4 (44:647).

²⁰ Livingston v. Jefferson, 1 Brock. 203, Fed. Cas. No. 8,411; McKenna v. Fisk, 1 How. 241-249

a suit to recover the value of trees cut and converted to defendant's use, and not for trespass to the land, is a transitory action, and follows the person of the defendant.²¹

§ 959. Special acts regulating venue in particular districts.— There are special acts of congress, regulating the venue of the circuit and district courts in many of the states, though not in all of them. Some of these special acts were passed prior and some subsequent to the passage of the present judiciary act, and are not displaced by it, but constitute local exceptions to the general rules upon the subject of venue prescribed by the general act, in conformity with the policy of the government from an early period to provide for the local conveniences and necessities of the several states.²² These special acts, in so far as they regulate the venue in civil suits are referred to below by states in alphabetical order.²³

(11:117); *Ellenwood v. Marietta Chair Co.*, 158 U. S. 105-108 (39; 913); U. S. Rev. Stat. secs. 741, 742.

²¹ *United States v. Stone*, 167 U. S. 178-196 (42:127).

²² *Petri v. Creelman Lumber Co.*, 199 U. S. 487-501 (50:281).

²³ Special Acts regulating venue cited by states in alphabetical order:—

Alabama: 23 U. S. Stat. at L. ch. 38, sec. 4, p. 18; 4 Fed. Stat. Anno. 627; U. S. Comp. Stat. 1901, pp. 318-319.

California: 31 U. S. Stat. at L. ch. 594, sec. 4, p. 220; 4 Fed. Stat. Anno. 628; U. S. Comp. Stat. 1901, p. 327.

Georgia: 21 U. S. Stat. at L. ch. 17, secs. 4, 8, p. 63; 4 Fed. Stat. Anno. 631; U. S. Comp. Stat. 1901, p. 334.

25 U. S. Stat. at L. ch. 168, sec. 3, p. 671; 4 Fed. Stat. Anno. 632; U. S. Comp. Stat. 1901, p. 337.

31 U. S. Stat. at L. ch. 185, sec. 2, p. 74; 4 Fed. Stat. Anno. 633; U. S. Comp. Stat. 1901, p. 340.

32 U. S. Stat. at L. ch. 1338, sec. 3, p. 551; 4 Fed. Stat. Anno. 634.

Idaho: 27 U. S. Stat. at L. ch. 145, sec. 4, p. 73; 4 Fed. Stat. Anno. 635-636; U. S. Comp. Stat. 1901, p. 343.

Illinois: 24 U. S. Stat. at L. ch. 315, sec. 4, p. 442; 4 Fed. Stat. Anno. 636; U. S. Comp. Stat. 1901, p. 345.

Indiana: U. S. Rev. Stat. sec. 743; 4 Fed. Stat. Anno. 636; U. S. Comp. Stat. 1901, p. 589.

Iowa: U. S. Rev. Stat. sec. 744; 4 Fed. Stat. Anno. 636.

21 U. S. Stat. at L. ch. 120, sec. 2, p. 155; 4 Fed. Stat. Anno. 637.

22 U. S. Stat. at L. ch. 312, sec. 9, p. 173; 4 Fed. Stat. Anno. 638.

31 U. S. Stat. at L. ch. 601, sec. 2 pp. 249, 730; 4 Fed. Stat. Anno. 638.

Kansas: 26 U. S. Stat. at L. ch. 403, sec. 2, p. 129; 4 Fed. Stat. Anno. 639; U. S. Comp. Stat. 1901, pp. 356-357.

27 U. S. Stat. at L. ch. 59, sec. 2, p. 24; 4 Fed. Stat. Anno. 639; U. S. Comp. Stat. 1901, pp. 357-358.

§ 960. Venue of suits of which federal courts have exclusive jurisdiction not controlled by general judiciary act.—The provisions of the general judiciary act now in force,²⁴ prescribing

Kentucky: U. S. Rev. Stat. sec. 745; 4 Fed. Stat. Anno. 639-640; U. S. Comp. Stat. 1901, pp. 589-590.

25 U. S. Stat. at L. ch. 792, sec. 2, p. 390; 4 Fed. Stat. Anno. 707-708.

Louisiana: 21 U. S. Stat. at L. ch. 144, sec. 2, p. 507; 4 Fed. Stat. Anno. 641; U. S. Comp. Stat. 1901, p. 364.

25 U. S. Stat. at L. ch. 789, sec. 2, p. 388; 4 Fed. Stat. Anno. 642; U. S. Comp. Stat. 1901, p. 366.

25 U. S. Stat. at L. ch. 869, sec. 3, p. 438; 4 Fed. Stat. Anno. 642; U. S. Comp. Stat. 1901, p. 367.

Michigan: 20 U. S. Stat. at L. ch. 326, sec. 3, p. 176; 4 Fed. Stat. Anno. 643; U. S. Comp. Stat. pp. 370-371.

28 U. S. Stat. at L. ch. 66, sec. 3, p. 67; 4 Fed. Stat. Anno. 644; U. S. Comp. Stat. 1901, p. 373.

Minnesota: 26 U. S. Stat. at L. ch. 167, sec. 2, p. 72; 4 Fed. Stat. Anno. 644-645; U. S. Comp. Stat. 1901, p. 375.

Mississippi: 22 U. S. Stat. at L. ch. 218, sec. 3, p. 102; 4 Fed. Stat. Anno. 645-646; U. S. Comp. Stat. 1901, pp. 378-379.

24 U. S. Stat. at L. ch. 279, sec. 2, p. 430; 4 Fed. Stat. Anno. 646; U. S. Comp. Stat. 1901, p. 381.

25 U. S. Stat. at L. ch. 58, sec. 2, p. 78; 4 Fed. Stat. Anno. 646-647; U. S. Comp. Stat. 1901, pp. 381-382.

28 U. S. Stat. at L. ch. 144, secs. 2, 4, p. 115; 4 Fed. Stat. Anno. 647; U. S. Comp. Stat. 1901, pp. 382-383.

Missouri: 24 U. S. Stat. at L. ch. 271, sec. 4, p. 425; 4 Fed. Stat.

Anno. 647-648; U. S. Comp. Stat. 1901, p. 387.

31 U. S. Stat. at L. ch. 164, sec. 4, p. 739; 4 Fed. Stat. Anno. 349-350; U. S. Comp. Stat. 1901, p. 390.

Nebraska: 34 U. S. Stat. at L. ch. 2073, secs. 7, 8, p. 999; Fed. Stat. Anno. Supplement 1907, p. 204.

North Dakota: 26 U. S. Stat. at L. ch. 161, sec. 4, p. 68; 4 Fed. Stat. Anno. 652; U. S. Comp. Stat. 1901, p. 400.

34 U. S. Stat. at L. ch. 3595, sec. 4, p. 609; Fed. Stat. Anno. Supplement 1907, p. 206-207.

Ohio: 20 U. S. Stat. at L. ch. 169, sec. 3, p. 102; 4 Fed. Stat. Anno. 652-653; U. S. Comp. Stat. 1901, p. 402.

21 U. S. Stat. at L. ch. 18, sec. 4, p. 64; 4 Fed. Stat. Anno. 653; U. S. Comp. Stat. 1901, pp. 403-404.

South Dakota: 28 U. S. Stat. at L. ch. 10, sec. 5, p. 6; 4 Fed. Stat. Anno. 656; U. S. Comp. Stat. 1901, p. 412.

Tennessee: 20 U. S. Stat. at L. ch. 359, sec. 1, p. 236; 4 Fed. Stat. Anno. 657; U. S. Comp. Stat. 1901, pp. 414-415.

21 U. S. Stat. at L. ch. 203, sec. 5, p. 176; 4 Fed. Stat. Anno. 657; U. S. Comp. Stat. 1901, p. 416.

31 U. S. Stat. at L. ch. 10, sec. 4, p. 6; 4 Fed. Stat. Anno. 658; U. S. Comp. Stat. 1901, p. 419.

Texas: 32 U. S. Stat. at L. ch. 183, sec. 10, p. 68; 4 Fed. Stat. Anno. 662.

Utah: 29 U. S. Stat. at L. ch. 366, sec. 3, p. 620; 4 Fed. Stat. Anno. 663; U. S. Comp. Stat. 1901, p. 435.

the district in which suits shall be brought, apply only to the classes of suits of which the circuit courts of the United States have original jurisdiction, concurrent with the courts of the several states, and do not apply to suits of which the courts of the United States have exclusive jurisdiction; but, where exclusive jurisdiction of any case or class of cases is vested in the circuit courts of the United States by special acts of congress, such suits may usually be brought where the cause of action accrued or wherever valid service can be had on the defendant or as may be specially provided by statute.²⁵

§ 961. Same—Venue of suits for infringement of letters patent.—It is specially provided by act of congress: “That in suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership or corporation, shall have committed acts of infringement and have a regular and established place of business. If suit is brought in a district of which defendant is not an inhabitant, but in which such defendant has a regular and established place of business, service of process, summons, or subpoena, upon the defendant, may be made by service upon the agent or agents engaged in conducting such business in the district in which the suit is brought.”²⁶

§ 962. Same—Venue of suits under federal statute to protect commerce.—Suits prosecuted under the “act to protect trade and commerce against unlawful restraints and monopolies” may be brought in the district in which the defendant resides or is found.²⁷

Washington: 26 U. S. Stat. at L. ch. 65, sec. 4, p. 26; 4 Fed. Stat. Anno. 663; U. S. Comp. Stat. 1901, p. 439.

²⁴ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 343.

²⁵ *Re Hohorst*, 150 U. S. 653-664 (37:1211); *Re Keasby & Mattison Co.*, 160 U. S. 221-231 (40:402); *Smith v. Sargent Mfg. Co.*, 67 Fed. R. 801; *Van Patten v. Chicago, M. & St. P. R. Co.*, 74 Fed. R. 981; *Earl*

v. Southern Pacific Co., 75 Fed. R. 609; *Southern Pacific Co. v. Earl (C. C. A.)* 82 Fed. R. 690; *Lederer v. Rankin*, 90 Fed. R. 449; *Spears v. Flynn*, 102 Fed. R. 6; *Ex parte Louisville Underwriters*, 134 U. S. 488-494 (33:991).

²⁶ 29 U. S. Stat. at L. ch. 395, p. 696; *Re Hohorst*, 150 U. S. 653-664 (37:1211).

²⁷ 26 U. S. Stat. at L. ch. 649, pp. 211, 212.

§ 963. Same—Venue of actions for damages under the federal anti-trust act—Where defendant resides or is found.—The seventh section of the act of congress “to protect trade and commerce against unlawful restraints and monopolies,” provides that any person who shall be injured, by a violation of the provisions of the act, in his business or property, may sue therefor in any circuit court of the United States “in the district in which the defendant resides or is found.”²⁸

§ 964. Venue of suits for pecuniary penalties and forfeitures.—All pecuniary penalties and forfeitures under the laws of the United States may be sued for and recovered either in the district where they accrue or in the district where the offender is found.²⁹

§ 965. Venue of suits for internal revenue taxes.—Taxes accruing under any law of the United States providing for internal revenue may be sued for and recovered either in the district where the liability for such tax accrued or in the district where the delinquent resides.³⁰

§ 966. Venue of suits by national banks to enjoin comptroller of the currency.—All proceedings and suits by any national banking association to enjoin the comptroller of the currency, under any provisions of any law of the United States, relating to national banking associations, must be filed and prosecuted in the district where such association is located.³¹

²⁸ 26 U. S. Stat. at L. ch. 647, sec. 7, p. 209; *Montague & Co. v. Lowry*, 193 U. S. 38-48 (48:608), S. C. 52 C. C. A. 621, 115 Fed. R. 27; *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U. S. 390-399 (51:241).

²⁹ U. S. Rev. Stat. sec. 732; 3 Fed. Stat. Anno. 94; U. S. Comp. Stat. 1901, p. 586.

³⁰ U. S. Rev. Stat. sec. 733; 3

Fed. Stat. Anno. 595; U. S. Comp. Stat. 1901, p. 586.

³¹ U. S. Rev. Stat. sec. 736; U. S. Comp. Stat. 1901, pp. 586-587; 5 Fed. Stat. Anno. 197.

NOTE: Suits to enjoin the comptroller of the currency are authorized by U. S. Rev. Stat. sec. 5237, and jurisdiction of such suits is vested in the circuit courts by U. S. Rev. Stat. sec. 629, par. 11.

CHAPTER XXI.

PARTIES TO SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

§ 967. The subject of parties controlled by state legislation—General rule.

968. Same—Limitations upon the rule.

969. Same—Same—Actions at law must be brought in the name of the party holding the legal title.

970. Same—Same—Actions at law must be brought against the party legally liable to plaintiff.

971. Same—Federal statute authorizing omission of parties defendant under certain contingencies.

§ 972. Subject of parties controlled by the rules of the common law—When.

973. Parties to suits for duties, imposts, taxes, penalties, and forfeitures.

974. Death of parties—*Scire facias* to bring in executor or administrator.

975. Same—When one of several plaintiffs or defendants dies.

976. Death or Expiration of term of public officer who is a party to a suit.

§ 967. The subject of parties controlled by state legislation—General rule.—Under the act of conformity, it is a general rule, to which there are some important exceptions, that, in the circuit courts of the United States, in suits at common law, of which the state and federal courts have concurrent jurisdiction, the subject of parties is controlled by the state statutes regulating that subject.¹ In accordance with this rule, it has been held by the federal supreme court that one who enters into a contract in his own name, but describes himself as the agent of an-

¹ U. S. Rev. Stat. sec. 914; Albany & Rensselaer Iron & Steel Co. v. Lundenberg, 121 U. S. 451-457 (30:982); Sawin v. Kenney, 93 U. S. 289-291 (23:926); Barrell v. Tilton, 119 U. S. 637-643 (30:511); Arkansas Valley Smelting Co. v. Belden Mining Co., 127 U. S. 379-390 (32:246); Maryland v.

Baldwin, 112 U. S. 490-495 (28:822); Delaware County v Diebold Safe & Lock Co., 133 U. S. 473-495 (33:674); Morning Journal Assoc. v. Smith, 56 Fed. R. 141; St. Louis Brewing Assoc. v. Hayes, 97 Fed. R. 859; Harris v. Hess, 10 Fed. R. 263; Neaderland Life Ins. Co. v. Hall, 84 Fed. R. 278, 2 C. C. A. 390.

other person, may maintain, in a federal circuit court, an action on such contract, in his own name, under and by virtue of a statute of the state where the suit is brought, which provides that: "Every action must be prosecuted in the name of the real party in interest, except that an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted;" and that "a person with whom, or in whose name, a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section." The supreme court, after referring to a decision of the state court construing the statute, declared that the rule thus established is applicable to actions at law in the courts of the United States held within the state enacting the statute.²

§ 968. Same—Limitations upon the rule.—As indicated in the section next preceding, there are some important limitations upon the rule, that the subject of parties in suits at common law in the federal circuit courts is controlled by state statutes.

In the great system of federal law and jurisprudence, the distinction between law and equity, and legal and equitable titles, and legal and equitable remedies, as defined by the rules and principles of the English common law, is fundamental, and is steadily maintained, and in judicial proceedings this distinction is rigidly enforced, and legal and equitable remedies are separately pursued; and, in order to maintain an action at law in a federal tribunal, the action, tested by the principles of the common law, must be a legal action, seeking legal relief, and the plaintiff must be vested with the legal title or right to the subject-matter of the action, and the defendant must be legally liable to the plaintiff, and subject to be sued by him in the particular action, and not liable merely to a suit in equity; and a state statute, regulating the subject of parties to suits, which contravenes these principles, or which blends legal and equitable remedies, will not be followed nor enforced in the courts of the United States.³

² *Albany & Rensselaer Iron & Steel Co. v. Lundenberg*, 121 U. S. 451-457 (30:982). 488 (16:198); *Bennett v. Butterworth*, 11 How. 669 (13:859); *Scott v. Armstrong*, 146 U. S. 499-

³ *Fenn v. Holme*, 21 How. 481-513 (36:1059); *Lindsay v. Bank*,

§ 969. **Same—Same—Actions at law must be brought in the name of the party holding the legal title.**—Except in those classes of cases in which a party is allowed to recover upon his prior possession, or by virtue of some special property in the subject-matter of the suit, every action at law, *ex contractu* or *ex delicto*, in the circuit courts of the United States, must be brought and prosecuted in the name of the party having the strict legal title, interest, right, or estate, and whose legal rights have been affected or injured; and a state statute, regulating the subject of parties, which authorizes and permits such suits to be brought and prosecuted in the name of a party holding an equitable title or interest only, is of no force or effect in the federal courts, and will be wholly disregarded by them, and in all such cases the question of parties will be determined by the rules and principles of the English common law.⁴

§ 970. **Same—Same—Actions at law must be brought against the party legally liable to plaintiff.**—Every personal action at law, *ex contractu* or *ex delicto*, in the circuit courts of the United States, must be brought and prosecuted against the party legally liable to the plaintiff upon the cause of action stated in the declaration. The duty, obligation, or liability alleged as the ground and basis of recovery must be a legal one, such as is recognized in courts of law, and must exist in favor of the plaintiff, and against the party named as defendant. An equi-

156 U. S. 485-494 (39:505); Highland Boy Gold Min. Co. v. Strickley, 54 C. C. A. 186; Robinson v. Campbell, 3 Wheat. 212-230 (4:372); Shierburn v. de Cordova, 24 How. 423-426 (16:741); Hooper v. Scheimer, 23 How. 235-249 (16:452); Langdon v. Sherwood, 124 U. S. 74-85 (31:344); Redfield v. Parks, 132 U. S. 239-252 (33:327); Carter v. Ruddy, 166 U. S. 493-501 (41:1090); Johnson v. Christian, 128 U. S. 374-382 (32:412); Foster v. Mora, 98 U. S. 425-428 (25:191); Sweatt v. Burton, 42 Fed. R. 286; Hurt v. Hollingsworth, 100 U. S. 100-104 (25:569); Willard v. Wood, 135 U. S. 309-314 (34:210); Keller v. Ashford, 133 U. S. 610-

626 (33:667); Willard v. Wood, 164 U. S. 502-526 (41:531); Bank v. Grand Lodge of Masons, 98 U. S. 123-125 (25:75).

⁴ Fenn v. Holme, 21 How. 481-488 (15:198); Hooper v. Scheimer, 23 How. 235-249 (16:452); Shierburn v. de Cordova, 24 How. 423-426 (16:741); Langdon v. Sherwood, 124 U. S. 74-85 (31:344); Redfield v. Parks, 132 U. S. 239-252 (33:327); Johnson v. Christian, 128 U. S. 374-382 (32:412); Carter v. Reedy, 166 U. S. 493-501 (41:1090); Foster v. Mora, 98 U. S. 425-428 (25:191); Bank v. Grand Lodge of Masons, 98 U. S. 123-125 (25:75); 1 Chitty. Pl. (12th Am. Ed.) 1, 2, 3, 60, 61, 62.

table claim or demand is not sufficient, although it would support an action at law in the courts of the state where the cause of action arose. The remedy is determined by the law of the forum, and the federal courts will not, in an action at law, enforce an equitable demand, nor will they enforce a legal demand against the defendant unless his liability upon it is in favor of the plaintiff in the action.⁵

§ 971. Same—Federal statute authorizing the omission of parties defendant under certain contingencies.—The federal courts will not conform to state procedure, when, to do so, would contravene any rule of procedure prescribed by a federal statute, or when the state law prescribing procedure is inconsistent with the terms, or would tend to defeat the purpose, or impair the effect, of any legislation of congress;⁶ and the rule that, in the federal circuit courts, in actions at law, the subject of parties is controlled by state statutes regulating that subject, is modified and limited by the federal statute authorizing the omission of parties defendant, under certain circumstances. That statute is as follows: “When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and nonjoinder of parties who are not inhabitants of nor found within the district, as aforesaid, shall not constitute matter of abatement or objection to the suit.”⁷

⁵ *Bank v. Grand Lodge of Masons*, 98 U. S. 123-125 (25:75); *Keller v. Ashford*, 133 U. S. 610-626 (33:667); *Willard v. Wood*, 135 U. S. 309-314 (34:210); *Willard v. Wood*, 164 U. S. 502-526 (41:531); *Hendrick v. Lindsay*, 93 U. S. 143-150 (23:855); *Delaware County v. Diebold Safe & Lock Co.*, 133 U. S. 473-495 (33:674); 1 *Chitty Pl.* (12th Am. Ed.) 33, 34, 35, 76, 77, 78, 79, 80, 81.

⁶ *Ex parte Fisk*, 113 U. S. 713 (28:1117); *Hanks Dental Assoc. v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:989); *Luxton v. North River Bridge Co.*, 147 U. S. 337 (37:194); *Chappelle v. United States*, 160 U. S. 499-514 (40:510).

⁷ U. S. Rev. Stat. sec. 737; 4 Fed. Stat. Anno. 552-554, where there is an extended note citing the cases construing this statute.

§ 972. **Subject of parties controlled by the rules of the common law—When?**—Where there is no applicable statute, state or federal, the subject of parties, in suits at common law, in the circuit courts of the United States, is controlled by the rules and principles of the common law, and the federal courts resort to the rules of that system for the purpose of determining questions of parties.⁸

§ 973. **Parties to suits for duties, imposts, taxes, penalties, and forfeitures.**—All suits for the recovery of any duties, imposts, or taxes, or for the enforcement of any penalty or forfeiture provided by any act of congress, respecting imports or tonnage, or the registering and recording or enrolling and licensing of vessels, or the internal revenue, or direct taxes, and all suits arising under the postal laws, or to enforce forfeitures under the sixth section of the “act to protect trade and commerce against unlawful restraints and monopolies,” must be brought and prosecuted in the name of the United States as plaintiffs.⁹

§ 974. **Death of parties—Scire facias to bring in executor or administrator.**—When either of the parties, whether plaintiff or defendant, in any suit at common law, in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment; and such executor or administrator may be brought in to prosecute or defend the suit by writ of *scire facias*, which must be served twenty days before any action can be taken by the court in the final disposition of the cause.¹⁰

⁸ Hendrick v. Lindsay, 93 U. S. 143-150 (23:855); Constable v. National Steamship Co., 154 U. S. 51-102 (38:903); Bank v. Grand Lodge of Masons, 98 U. S. 123-125 (25:75); Keller v. Ashford, 133 U. S. 610-626 (33:667); Willard v. Wood, 135 U. S. 309 (34:210); Willard v. Wood, 164 U. S. 502-526 (41:531); Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131-141 (45:121); Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92-103

(42:673); Warax v. R. Co., 72 Fed. R. 637; Hukill v. R. Co., 72 Fed. R. 745; Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206-220 (50:441).

⁹ U. S. Rev. Stat. sec. 919; 4 Fed. Stat. Anno. 586; 26 U. S. Stat. at L. ch. 647, sec. 6, pp. 209, 210.

¹⁰ U. S. Rev. Stat. sec. 955; 4 Fed. Stat. Anno. 601-602; Ex parte Connaway, 178 U. S. 421-435 (44:1134).

§ 975. **Same**—When one of several plaintiffs or defendants dies.—“If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff or against the surviving defendant, and one or more of them dies, the writ or action shall not be thereby abated; but, such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff against the surviving defendant.”¹¹

§ 976. **Death or expiration of term of public officer who is a party to a suit.**—It is provided by a federal statute, “that no suit, action or other proceeding, lawfully commenced by or against the head of any department or bureau or other officer of the United States in his official capacity, or in relation to the discharge of his official duties, shall abate by reason of his death, or the expiration of his term of office, or his retirement, or resignation, or removal from office, but, in such event, the court, on motion or supplemental petition filed, at any time within twelve months thereafter, showing a necessity for the survival thereof to obtain a settlement of the questions involved, may allow the same to be maintained by or against his successor in office, and the court may make such order as shall be equitable for the payment of costs.”¹²

This statute was, no doubt, passed upon the suggestion of the supreme court, to relieve from the inconveniences of the law as it previously existed.¹³

¹¹ U. S. Rev. Stat. sec. 956; 4 Fed. Stat. Anno. 603; *Moses v. Wooster*, 115 U. S. 285-288 (29:391).
¹² 30 U. S. Stat. at L. ch. 121, p. 822; 6 Fed. Stat. Anno. 614; U. S. Comp. Stat. 1901, 697.
¹³ *United States v. Butterworth*, 139 U. S. 600-606 (42:873).

CHAPTER XXII.

THE STATE SYSTEM OF PLEADING FOLLOWED IN THE FEDERAL COURTS IN SUITS AT COMMON LAW— IMPORTANT EXCEPTIONS.

§ 977. State system of pleading adopted in the federal courts in suits at common law.

978. A summary of the limitations upon the rule that the federal courts are re-

quired to follow the state system of pleading.

§ 979. Same—Equitable set-off and equitable counter-claim.

980. Reason and foundation of the rule limiting conformity to the state system of pleading.

§ 977. State systems of pleading adopted in the federal courts in suits at common law.—By the “act of conformity,” the circuit courts and district courts of the United States are required to conform, “as near as may be,” to the system of pleading “existing at the time in like causes in the courts of record of the state within which such circuit and district courts are held.” Congress adopted, for the government of the federal courts, in suits at law, with certain important exceptions, the *state pleading as a system*, including the form and requisites of pleading, the method of commencing an action at law, the method of presenting plaintiff’s case, and the defenses of the defendant, and the manner of stating the facts which constitute the plaintiff’s cause of action and the grounds of defendant’s defense; and including, also, the form and order of pleading. If, according to the state system, pleas to the jurisdiction, pleas in abatement or suspension of the action, and pleas in bar of the action, are pleaded and disposed of separately and successively, or if they are pleaded together and in one pleading, the district and circuit courts are required to conform to such order of pleading, except that pleas to the jurisdiction of the person must be separately pleaded. If, according to the state system, demurrers and averments of fact which go to the merits and in bar of the action are pleaded separately and successively, or if

they are pleaded together and in one pleading, the district and circuit courts are required to conform to that scheme of pleading. Whatever the state system of pleading may be, whether a modification of the common law system of special pleading, as in the states of Mississippi and Alabama, or the code system of pleading, which exists in most of the states, or the Texas system, or the Louisiana system, which are modifications of the civil law system, the federal courts must conform to the local system in each respective state, "as near as may be," and when to do so will not, in any respect, contravene the constitution and laws of the United States.¹

§ 978. A summary of the limitations upon the rule that the federal courts are required to follow the state system of pleading.—The federal courts are not required, and cannot be required, to conform to the state system of pleading in those instances and particulars in which the state system disregards the distinction between common law and equity jurisprudence, and the common law and equity jurisdiction of courts, and remedies at common law and in equity, and blends legal and equitable remedies in one system of remedies;² nor when the state sys-

¹ U. S. Rev. Stat. sec. 914; 4 Fed. Stat. Anno. 563; *Southern Pacific Co. v. Denton*, 146 U. S. 202-210 (36:943); *Roberts v. Lewis*, 144 U. S. 653-658 (36:579); *Chemung Canal Bank v. Lowery*, 93 U. S. 72-78 (23:806); *Glenn v. Sumner*, 132 U. S. 152-157 (33:301); *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36:162); *Robertson v. Perkins*, 129 U. S. 233-238 (32:686); *Forsyth v. Doolittle*, 120 U. S. 73-78 (30:586); *Depurton v. Young*, 134 U. S. 24-260 (33:923); *Cook v. Avery*, 147 U. S. 375-386 (37:209); *Ex parte Connaway*, 178 U. S. 421-435 (44:1134); post section 1034.

In *Roberts v. Lewis*, supra, Mr. Justice Gray, delivering the opinion of the court, said:

"Doubtless, so long as the rules of pleading in the courts of the United States remained as at com-

mon law, the requisite citizenship of the parties, if duly alleged or apparent in the declaration, could not be denied by the defendant, except by a plea in abatement, and was admitted by pleading to the merits of the action. But since 1872, when congress assimilated the rules of pleading, practice, and forms and modes of procedure in actions at law in the courts of the United States to those prevailing in the courts of the several states, all defenses are open to a defendant in the circuit court of the United States, under any form of plea, answer or demurrer, which would have been open to him under like pleading in the courts of the state within which the circuit court is held."

² *Bennett v. Butterworth*, 11 How. 669 (13:859); *Scott v. Neely*, 140 U. S. 106-117 (35:358); *Cates*

tem permits legal actions to be brought and prosecuted upon equitable titles;³ nor when the state system permits equitable defenses to be interposed to legal actions;⁴ nor when the state system permits equitable actions to be brought and prosecuted upon purely legal titles, and in regard to which the plaintiff has a plain, adequate and complete remedy at law;⁵ nor when the state system permits a foreclosure of liens in an action at law;⁶ nor when there is no "like cause" known to the laws of the state.⁷

§ 979. Same—Equitable set-off and equitable counter-claim. The federal courts are not required to conform to a state rule of pleading which permits a defendant in a suit at common law to plead an equitable off-set or an equitable counter-claim against the plaintiff in the action. Such a rule of pleading is in contravention of the federal rule, founded on the constitution, which inhibits the blending together of legal and equitable claims in one suit, and the interposition of equitable defenses to actions at law.⁸

§ 980. Reason and foundation of the rule limiting conformity to the state system of pleading.—The reason and foundation of the rule limiting the federal courts in conforming to the state system of pleading, as stated in the two sections next preceding

v. Allen, 149 U. S. 451-465 (37:804); Hurt v. Hollingsworth, 100 U. S. 100-104 (25:569).

³ Fenn v. Holme, 21 How. 481-488 (16:198); Hooper v. Schelmer, 23 How. 235-249 (16:452); Shierburn v. de Cordova, 24 How. 423-426 (16:741); Langdon v. Sherwood, 124 U. S. 74-85 (31:344); Redfield v. Parks, 132 U. S. 239-252 (33:327); Richardson v. L. & N. R. Co., 169 U. S. 128 (42:687); Lockhart v. Johnson, 181 U. S. 516-530 (45:979); Sweatt v. Burton, 42 Fed. R. 282; Kercher v. Murray, 60 Fed. R. 52.

⁴ Bagnell v. Broderick, 13 Pet. 436 (10:235); Robinson v. Campbell, 3 Wheat. 207 (4:372); Scott v. Armstrong, 146 U. S. 499-513 (36:1059); Foster v. Mora, 98 U. S.

425-428 (25:191); Johnson v. Christian, 128 U. S. 374-382 (32:412); Green v. Mezes, 24 How. 268-278 (16:661); Watkins v. Holman, 16 Pet. 25-64 (10:873); Burnes v. Scott, 117 U. S. 582-591 (29:991); Northern Pacific R. Co. v. Paine, 119 U. S. 561-566 (30:513).

⁵ Whitehead v. Shattuck, 138 U. S. 146-156 (34:873); Hurt v. Hollingsworth, 100 U. S. 100-104 (25:569).

⁶ Sheffield Furnace Co. v. Withero, 149 U. S. 574-580 (37:853).

⁷ Coffey v. United States, 117 U. S. 233-235 (29:890).

⁸ Anglo-American Land M. & A. Co. v. Lombard (C. C. A.) 132 Fed. R. 721; Crissey v. Morrill, 60 C. C. A. 460; Scott v. Armstrong, 146 U. S. 499-513 (36:1059).

is that, the federal constitution established the distinction between the common law and equity jurisdiction of the federal courts, and requires that legal and equitable remedies shall be separately pursued, and secures to the parties in actions at law the right of a trial of all issues of fact by a jury; and it is not within the competency of congress to require the federal courts to conform to the state systems of pleading in those particulars in which they contravene the judicial system established by the constitution. The limitations upon the operation of the conformity act result, inevitably, from an absolute want of power in the legislative branch of the federal government.*

* Bennett v. Butterworth, 11 Wheat. 207 (4:372); Lindsay v. How. 669 (13:859); Scott v. Neely, Bank, 156 U. S. 485-494 (39:505); 140 U. S. 106-117 (35:358); Cates Fenn v. Holme, 21 How. 481-488 v. Allen, 149 U. S. 451-465 (38: (16:198). 804); Robinson v. Campbell, 3

CHAPTER XXIII.

PLAINTIFF'S DECLARATION, COMPLAINT OR PETITION IN A SUIT AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 981. The commencement of an action at law in the federal circuit courts.</p> <p>982. The declaration, complaint or petition should conform to the laws of the state.</p> <p>983. The general requisites of the declaration, complaint or petition.</p> <p>984. The three essential elements of the body of the declaration, complaint or petition.</p> <p>985. The declaration, complaint or petition must state a cause of action within the jurisdiction of a court of law.</p> <p>986. Same—Must state a case upon which a court of common law has jurisdiction to render and execute judgment.</p> <p>987. Joinder of causes of action at common law—Actions <i>ex contractu</i>.</p> <p>988. Same—Actions <i>ex delicto</i>.</p> <p>989. Same—Same—Exception to rule last stated.</p> <p>990. Same — Same — Action against master and servant.</p> | <p>§ 991. Same — Causes of action <i>ex contractu</i> and <i>ex delicto</i> cannot be joined.</p> <p>992. Same—Same—Exception—debt and detinue.</p> <p>993. Same—All causes joined must be in the same right.</p> <p>994. Same—Counts in trespass <i>quare clausum fregit</i> and <i>de bonis asportatis</i> may be joined.</p> <p>995. Same—Counts in trespass <i>quare clausum fregit</i> and for assault and battery may be joined.</p> <p>996. Same—Counts for false warranty and deceit may be joined.</p> <p>997. Same—Duplicity.</p> <p>998. Same—Joinder under code procedure.</p> <p>999. Same — Same — Joinder of legal and equitable causes of action.</p> <p>1000. Same—Same—Death by wrongful act.</p> <p>1001. Stating plaintiff's cause of action—Conformity to state pleading.</p> <p>1002. The jurisdictional facts must be alleged.</p> |
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§ 981. The commencement of an action at law in the federal circuit courts.—By the ancient common law, personal actions were commenced by original writ, which was a mandatory letter from the king in chancery, sealed with his great seal, and,

in the king's name, directed to the sheriff of the county where the injury was alleged to have been committed, containing a summary statement of the cause of complaint, and requiring him, in most cases, to command the defendant to satisfy the claim, and, on his failure to comply, then to summon him to appear in one of the superior courts of common law, there to account for his non-compliance. The suit was considered as commenced and pending from the date of the issuing of the writ; and the declaration, which was a legal specification of the cause of action, and an exposition of the writ, with the addition of time, place, and other circumstances, was filed or delivered after the writ had been served upon the defendant and returned, and he had entered his appearance in the action.¹ The commencement of actions by bill of Middlesex and *latitat* is not the ancient and regular mode, but in the nature of an exception to it.²

In the circuit courts of the United States, an action at law is commenced by the filing, with the clerk of the court, of the plaintiff's declaration, complaint, or petition, and the issue, service, and return, of summons in conformity to the laws of the state in which such courts are held.³ In some states, the action is deemed to be commenced and pending from the time of the filing of the declaration, complaint or petition, in others from the issue of the summons, and still in others from the service of the process upon the defendant; and, for a determination of the point in any case, recourse must be had to the local law.⁴

§ 982. The declaration, complaint, or petition should conform to the laws of the state.—In actions at law in the federal circuit courts, plaintiff's declaration, complaint or petition, must conform to, and be drawn and constructed in accordance with the rules of the state system of pleading.⁵ But this rule is sub-

¹ Stephens, Pl. (Philadelphia ed. 1824) 5, 28, 29, 32, 56; 1 Tidd's Prac. 93-108, 361; 1 Chitty, Pl. (12th Am. ed.) 259, 260; 3 Blk. Com. 273, 274.

² Stephens, Pl. (Philadelphia ed. 1824) 4, 5, 55.

³ U. S. Rev. Stat. sec. 914; 4 Fed. Stat. Anno. 563; Roberts v. Lewis, 144 U. S. 653-658 (36:

579); Ex parte Connaway, 178 U. S. 421-435 (44:1134).

⁴ Ex parte Connaway, 178 U. S. 421-435 (44:1134).

⁵ Glenn v. Sumner, 132 U. S. 152-157 (33:301); Roberts v. Lewis, 144 U. S. 653-658 (36:579); Robertson v. Perkins, 129 U. S. 233-238 (32:686).

ject to all the restrictions and limitations arising out of the distinction between law and equity and legal and equitable remedies recognized and enforced in the federal courts.⁶

§ 983. **The general requisites of the declaration, complaint, or petition.**—The general requisites of the declaration, complaint, or petition are: (1) A designation of the court in which the action is commenced, including the district and division; (2) a statement of the names of all the parties, plaintiffs and defendants, to the action; (3) a statement of the jurisdictional facts, showing that the action belongs to a class of cases over which the jurisdiction is, by the constitution and laws of the United States, vested in the federal circuit courts, and that the defendants are liable to be sued in that action in that court; (4) a plain, concise, truthful, certain, logical and methodical statement of all the facts constituting plaintiff's cause of action, and which are essential to his right of recovery, and showing a right of action complete in the plaintiff at the time the suit was commenced; and (5) a demand or prayer for judgment.⁷

§ 984. **The three essential elements of the body of the declaration, complaint or petition.**—In every description of action, the *body* of the declaration, complaint, or petition—that is, that part of it which contains the statement of the cause of action—consists of *three different points*, namely: (1) the *right*, whether founded upon contract or tort independent of contract; (2) the *injury* to such right; and (3) the consequent *damages*. These are the three essential elements of the cause of action, and the facts constituting them should be alleged with certainty, and in a logical and methodical manner.⁸

§ 985. **The declaration, complaint, or petition must state a cause of action within the jurisdiction of a court of law.**—In an action at law in the federal circuit courts, the declaration, complaint, or petition, must state a combination of facts, which, when tested by the definitions, principles and rules of the Eng-

⁶ Ante secs. 977, 978, 979, 980, and the adjudicated cases there cited

⁷ Roberts v. Lewis, 144 U. S. 653-658 (36:579); Robertson v. Perkins, 129 U. S. 233-238 (32:686); 1 Chitty, Pl. (12th Am. ed.)

213, 232, 233, 240, 244, 255, 256, 259, 266; Gould's Pl. (3rd ed.) ch. IV, secs. 7-14.

⁸ 1 Chitty, Pl. (12th Am. ed.) 287; Gould's Pl. (3rd ed.) ch. IV, secs. 7-16. 1 Tidd's Prac. (1807) 378, 390.

lish common law, as those definitions, principles and rules existed, and were known and understood, and judicially applied and administered in England at the time of the adoption of the federal constitution,⁹ constitutes a cause of action within the jurisdiction of a court of common law, as distinguished from courts of equity and admiralty;¹⁰ otherwise, the complaint will be fatally defective, and, upon demurrer, the action will be dismissed.¹¹

§ 986. Same—Must state a case upon which a court of common law has jurisdiction to render and execute judgment.—The declaration, complaint, or petition must state a case upon which, after verdict found in favor of plaintiff, the court has power to render and execute judgment according to the course of the common law.¹² Jurisdiction means, not only power to hear and determine, but also, power to render judgment and award execution;¹³ and the only pecuniary judgment which the common law courts of England could render was a judgment for a liquidated sum of money, capable of immediate execution, by writs of *fiery facias*, *venditioni exponas*, *eligit*, *extendi facias*, and similar writs.¹⁴ And it has been held that a circuit court of the United States, sitting as a court of law in the state of Texas, has no jurisdiction of a suit for damages for death by wrongful act, brought by the widow and children of the deceased, against a railroad company, created by the state of Colorado, and operating a railroad from Texas into the Republic of Mexico, where the injury occurred, the damages being claimed under the statutory laws of that country, authorizing a recovery, in such cases, of a pecuniary judgment, to be paid periodically, and in unliquidated sums, and to continue for an indeterminate period; and it was further held that the court, sitting in Texas,

⁹ *Fenn v. Holme*, 21 How. 481-488 (16:198); *Robinson v. Campbell*, 3 Wheat. 207-224 (4:372); *Bennett v. Butterworth*, 11 How. 669-676 (13:859).

¹⁰ *Parsons v. Bedford*, 3 Pet. 433-439 (7:732).

¹¹ *Lindsay v. Bank*, 156 U. S. 485-494 (39:505); *Slater v. Mexican National R. Co.*, 194 U. S. 120-135 (48:900).

¹² *Lindsay v. Bank*, 156 U. S. 485-494 (39:505); *Slater v. Mexican National R. Co.*, 194 U. S. 120-135 (48:900).

¹³ *Wayman v. Southard*, 10 Wheat. 1-50 (6:253); *Knox County v. Aspinwall*, 24 How. 384 (16:738).

¹⁴ 2 Tidd's Prac. (1807) 841, 842, 909-952.

could not, in such case render a judgment for a liquidated amount, in accordance with the laws of that state authorizing the recovery of damages in cases of death by wrongful act.¹⁵

§ 987. Joinder of causes of action at common law—Actions *ex contractu*.—It is a rule of common law pleading, that several counts may be joined in the same action for different causes, provided they are of the same nature. In actions upon contract, the plaintiff may join as many different counts in the action of assumpsit as he has causes of that nature; and the same rule applies to the actions of account, covenant, debt, annuity, and *scire facias*; but counts in any one of these forms or species of action cannot be joined with counts in another. In order to join different causes, they must be of the same nature.¹⁶ An action of debt on bond or other specialty may be joined in the same action with a count in debt on a judgment, or on a simple contract, or on a statute.¹⁷ Counts in debt and assumpsit cannot be joined,¹⁸ nor counts in covenant and assumpsit.¹⁹

§ 988. Same—Actions *ex delicto*.—In actions for wrongs independently of contracts, the plaintiff may join as many different counts as he has causes of action in the actions of trespass on the case, trespass, detinue and replevin, each, respectively; but counts in any one of these forms or species of action cannot be joined with counts in another. As in actions on contract, so, in actions *ex delicto*, in order to join different causes, they must be of the same nature.²⁰

¹⁵ Slater v. Mexican National R. Co., 194 U. S. 120-135 (48:900).

¹⁶ 1 Tidd's Prac. (1807) 10-13; 1 Chitty, Pl. (12th Am. ed.) 199, 200; Stephens, Pl. (Philadelphia ed. 1824) 279, 280.

¹⁷ Union Cotton Manufactory v. Lobdell, 13 Johns. 462, 463, 5 L. Ed. 693; Mardis v. Terrell, Walker (Miss.) R. 327; Tillotson v. Stiff, 1 Blackf. 77; Flood v. Yandes, 1 Blackf. 102; Smith v. Lowell, 8 Pick. 178; Vandensen v. Blum, 18 Pick. 229; Farnham v. Hay, 3 Blackf. 167; Elb v. Pendall, 5

Leigh, 109; Patterson v. Chalmers, 7 B. Monroe, 595.

¹⁸ Flood v. Yandes, 1 Blackf. 102.

¹⁹ Phillips Const. Co. v. Seymour, 91 U. S. 646-656 (23:341).

²⁰ 1 Tidd's Prac. (1807) 10-13; 1 Chitty Pl. (12th Am. ed.) 200, 201; Baker v. Dumbolton, 10 Johns. 240, 241, 4 L. Ed. 1015; Prescott v. Tufts, 4 Mass. 146; Fairfield v. Burt, 11 Pick. 244; Worster v. Canal Bridge, 16 Pick. 541; Shippen v. Bowen, 122 U. S. 576-583 (30:1173).

§ 989. **Same—Same—Exception to rule last stated.**—There seems to be an exception to the rule, just stated, that counts upon wrongs of a different nature cannot be joined in the same action. The plaintiff may in a declaration in trespass, unite a count for the battery or seduction of his servant, *per quod servitium amisit*, with a count for battery of the plaintiff himself, or *quare clausum fregit*, or trespass and rescue; and all these counts may be included in one declaration, though the loss of service, and consequence of the rescue, are properly the subjects of an action on the case.²¹

§ 990. **Same—Same—Action against master and servant.**—There is a conflict of authority whether at common law the master and servant can be joined as defendants, as the perpetrators of a joint tort, in a suit to recover damages for an injury inflicted by the negligence of the servant, without the presence of the master, and without his express direction. It is contended by those courts which hold that the master and servant cannot be so joined, that the cause of action against the servant is trespass, while the cause of action against the master is trespass on the case, and that, according to the common law rules of pleading, those causes of action cannot be joined.²² This question has never been passed upon by the United States supreme court; but that court has frequently held that the joining of the master and servant in such an action does not present a separable controversy within the meaning of the removal statutes.²³

²¹ 1 Tidd's Prac. (1807) 10, 11; 1 Chitty, Pl. (12th Am. ed.) 201.

²² Cases holding the servant and master may be so joined: Wright v. Wilcox, 19 Wend. 343; Suydam v. Moore, 8 Barb. 358; Montfort v. Hughes, 3 E. D. Smith, 591; Phelps v. Wart, 30 N. Y. 78; Wright v. Compton, 53 Ind. 337; Greenberg v. Lumber Co. (Wis.) 63 N. W. 93; Newman v. Fowler, 37 N. J. L. 89.

Cases holding the servant and master cannot be so joined: Parsons v. Winchell, 5 Cush. 592; Mulchey v. Religious Soc., 125

Mass. 487; Clark v. Fry, 8 Ohio St. 358, 377; Seelin v. Ryan, 2 Cin. R. 158; Campbell v. Sugar Co., 62 Me. 553; Beuttel v. Ry. Co., 26 Fed. R. 50; Page v. Parker, 40 N. H. 47-68; Bailey v. Bussing, 37 Conn. 349, 351; Warax v. Ry. Co., 72 Fed. R. 637-647.

²³ Alabama Great Southern Ry. Co. v. Thompson, 200 U. S. 206-220 (50:441), collecting cases; Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 92-103 (42:673); Chesapeake & Ohio Ry. Co. v. Dixon, 179 U. S. 131-141 (45:121).

§ 991. Same—Causes of action ex contractu and ex delicto cannot be joined.—It is, no doubt, a well-settled rule, that, at common law, causes of action founded on tort, and causes of action founded on contract, cannot be joined in the same declaration.²⁴

§ 992. Same—Same—Exception—Debt and detinue.—An exception to the rule that causes of action upon contract, and causes of action arising out of wrongs independently of contract, cannot be joined, is that counts in debt and detinue may, at common law, be joined in the same declaration. This is a seeming incongruity of the law, but it may be accounted for upon the ground that the detinue may sometimes arise out of contract, and it has been said that in order to join the two causes of action they must both arise out of contract.²⁵

§ 993. Same—All causes joined must be in the same right.—In order to join several causes in one action, it must, at common law, be brought, as to all of them, in the same right; and, upon that ground, it is settled, that a plaintiff cannot join in the same action a demand as executor, with another which accrued in his own right. But a count for money had and received by the defendant to the use of the executor, as such, may be joined with a count for money had and received to the use of the testator; and an executor or administrator may declare as such on an account stated by the defendant with the testator or intestate, or to money due himself in his representative capacity.²⁶

“It is a well settled rule, in actions by a plaintiff who is an executor or administrator, that where the money, when recovered, would be assets, the executor may declare for it in his representative capacity; and the best line to adopt in determining whether counts may be joined, is to consider whether the sum, when recovered, would be assets. It is therefore clear, that an executor or administrator may declare as such, for goods sold or money paid by him in that character; and may join such

²⁴ 1 Tidd's Prac. (1807) 10, 11; 1 Chitty, Pl. (12th Am. ed.) 201; Church v. Mumford, 11 Johns. 479-481, 5 L. Ed. 229; Wickliffe v. Saunders, 6 Monroe, 298; Wickliffe v. Davis, 2 J. J. Marsh. 70; Carstarphen v. Graves, 1 A. K.

Marsh. 435; Traudle v. Arnold, 7 J. J. Marsh. 407.

²⁵ 1 Tidd's Prac. (1807) 10, 11; 1 Chitty, Pl. (12th Am. ed.) 200 and notes b and 2.

²⁶ 1 Tidd's Prac. (1807) 12, 13.

count with counts on promises to the testator or intestate. So money had and received by the defendant to the use of the plaintiff as executor, and an account stated with him as executor, for moneys due and owing the testator, or to the plaintiff as executor, or to the plaintiff and his wife as executrix, may be joined with counts on promises to the testator or intestate; and as an executor may, under circumstances, lend money, it should seem that the insertion of a count for money lent by him as such would not be a misjoinder. And counts on promises made to an intestate may be joined on promissory notes given to the plaintiff as administrator since the death of the intestate." But an executor cannot join counts on causes of action accruing to him in his private right and individual character, with counts on causes of action which are alleged to be vested in him in his representative character.²⁷

In an action of assumpsit by an administrator *de bonis non*, a count alleging a promise to have been made to the first administrator, may be joined with counts alleging a promise to plaintiff's intestate, and a promise to the plaintiff.²⁸

The assignees of two bankrupts, under separate commissions, cannot recover in the same action a joint debt due from the defendant to both bankrupts, and also a separate debt due to each.²⁹

§ 994. Same—Counts in trespass quare clausum fregit and de bonis asportatis may be joined.—A count for a trespass upon plaintiff's land, and a count for felling, carrying away and converting the timber thereon standing, or for taking away or destroying his goods, may be joined in the same declaration, although the former is a local and the latter a transitory action, and the issues upon the local count can be tried only in the jurisdiction where the land is situated.³⁰ But a count in debt for a penalty given by statute for cutting trees cannot be joined with a count in trespass upon the land;³¹ and where such pen-

²⁷ 1 Chitty, Pl. (12th Am. ed.) 203, 204.

²⁸ Sullivan v. Holker, 15 Mass. 374.

²⁹ 1 Tidd's Prac. (1807) 13.

³⁰ Parker v. Parker, 17 Pick. 236; Bishop v. Baker, 19 Pick.

517; Doulson v. Matthews, 4 Term Rep. 503; McKenna v. Flisk, 1 How. 241-249 (11:117); Ellenwood v. Marietta Chair Co., 158 U. S. 105-108 (39:913).

³¹ Elder v. Hilzheim, 6 George (Miss.) 231.

alty is given by statute for cutting trees, debt, and not trespass, is the proper remedy for the recovery of the penalty.³²

§ 995. **Same—Counts in trespass quare clausum fregit and for assault and battery may be joined.**—The plaintiff may, in a declaration in trespass, join a count for trespass upon his lands, with a count for an assault and battery upon himself; and especially so, when the two trespasses are contemporaneous.³³

§ 996. **Same—Counts for false warranty and deceit may be joined.**—In an action on the case, a count on a false warranty in the sale of personal property, and a count for deceit in the sale of the same property, may be joined in the same declaration; and, in such case, it is not necessary for the plaintiff to either aver or prove *scienter* upon the part of the defendant. It has long been settled, both in English and American jurisprudence, that either assumpsit or a special action on the case will lie for a false warranty; and, if the declaration or complaint be in tort, counts for deceit may be added to the special count, and a recovery may be had either for the false warranty or for the deceit, according to the proof. Either count, supported by proof, will sustain the action.³⁴

§ 997. **Same—Duplicity.**—The joinder of several counts in the same declaration, when each of those counts relates to a separate, distinct, substantive cause of action, is not a violation of the common law rule against duplicity, the object of which rule is to prevent several issues in respect of the same demand, there being no objection to several issues where the demands are several. The meaning of the rule, as applied to the declaration is, that it must not, in support of a single demand, allege several distinct matters, any one of which is sufficient to support that demand. The plaintiff cannot, by the common law rule, in order to sustain a single demand, rely upon two or more distinct grounds or matters, each of which, independently of

³² Ware v. Collins, 6 George (Miss.) 223.

³³ 1 Chitty, Pl. (12th Am. ed.) 201; Arnold v. Maudlin, 6 Blackf. 187; Stephen's Pl. (Philadelphia ed. 1824) 279, 280.

³⁴ Shippen v. Bowen, 122 U. S. 576-583 (30:1172); Schuchardt v.

Allen, 1 Wall. 359-371 (17:642);

Dushane v. Benedict, 120 U. S.

630-648 (30:810); Kimber v.

Younger, 137 Fed. R. 744, 70 C. C.

A. 178; 1 Chitty, Pl. (12th Am.

ed.) 137; Patterson v. Kirkland,

5 George (Miss.) 423; Williamson

v. Allison, 2 East, 441.

the other, amounts to a good cause of action in respect of such demand.³⁵

§ 998. Same—Joinder under code procedure.—In the code states, there has been an effort to regulate the joinder of causes of action by legislation;³⁶ but an examination of the code provisions of the various states, and the decisions of the state courts construing them, discloses the fact that there has been an utter failure to establish a logical and uniform system, and that there is great contrariety of judicial opinion, and not a little confusion. But where the state law has established a certain and definite rule in regard to the joinder of causes of action of a strictly legal nature, the federal courts will conform to it;³⁷ and where there is no such state rule, those courts will follow the rules of the common law.³⁸

§ 999. Same—Same—Joinder of legal and equitable causes of action.—One of the main objects of the code procedure is, to abolish the distinction between legal and equitable remedies, and to authorize the joinder of legal and equitable causes of action in the same complaint or petition; and similar provisions, though not so sweeping, are to be found in the legislation of some of those states which are denominated common law states. But to those state rules of procedure, the federal courts do not, and, under the federal constitution, cannot conform.³⁹

§ 1000. Same—Same—Death by wrongful act.—Death by negligence or wrongful act was not a cause of civil action for damages at common law. Such actions are creatures of statute; and a state has the right and the power, by its constitution and laws, to create a joint action, for damages, for death resulting from an injury inflicted by negligence, or wrongful act, against

³⁵ Stephens, Pl. (Philadelphia ed. 1824) 264, 265, 284; 1 Chitty, Pl. (12th Am. ed.) 226, 227; Schuchardt v. Allen, 1 Wall. 359-371 (17:642); Shippen v. Bowen, 122 U. S. 576-583 (30:1172).

³⁶ Pom. Rem. (2nd ed.) sec. 438 et seq.

³⁷ Philips Const. Co. v. Seymour, 91 U. S. 646-656 (23:341); Callison v. Brake, 129 Fed. R. 196, 63 C. C. A. 354; Cincinnati, New Or-

leans & Texas Pac. Ry. Co. v. Bohon, 200 U. S. 221-226 (50:448).

³⁸ Shippen v. Bowen, 122 U. S. 676-683 (30:1172); Kimber v. Younger, 137 Fed. R. 744, 70 C. C. A. 178.

³⁹ Scott v. Neely, 140 U. S. 106-117 (35:358); Cates v. Allen, 149 U. S. 451-465 (37:804); Cherokee Nation v. Southern Kansas Ry. Co., 135 U. S. 641-661 (34:295).

the persons or corporations and their agents or servants causing the same, and to allow the master and servant to be sued jointly upon such cause of action, and such rule, when so established, is binding on the federal courts.⁴⁰

§ 1001. **Stating plaintiff's cause of action—Conformity to state pleading.**—The great office of the declaration, complaint, or petition, is, of course, to state the facts which constitute plaintiff's cause of action, and this should be done in the manner and form, and in accordance with the rules and principles of pleading prescribed by the law of the state in which the circuit court is held. The complaint should, in the language of the common law, be "a legal specification of the cause of action," tested by the state law of pleading. The supreme court has distinctly held that the sufficiency and scope of a complaint in a suit at common law in a federal circuit court must be determined by the state law of procedure, where that law furnishes a rule.⁴¹ But where the state law furnishes no rule for the determination of the sufficiency of the complaint, or other question in regard to such pleading, the federal courts will have recourse to the rules and principles of the common law system of pleading, and will refer to common law authorities.⁴² According to the common law system of pleading, in actions upon contract, the declaration must in all cases state the contract upon which the action is founded, and the breach of it, and the resultant injury. Except in actions upon sealed instruments, and promissory notes and bills of exchange, which imply a consideration, the consideration and the promises should be averred; and, where the consideration is executory, or the performance of the defendant's covenant or agreement is made to depend upon the performance of a condition precedent on the part of plaintiff, the declaration ought to aver that the consideration has been executed, or the condition performed, or it should aver a lawful excuse for non-performance. When a notice or request on the part of the plaintiff is required by

⁴⁰ Cincinnati, New Orleans & Texas Ry. Co. v. Bohon, 200 U. S. 221-229 (50:448); Atlantic & Pacific Ry. Co. v. Laird, 164 U. S. 393-403 (41:485); Barry v. Edmunds, 116 U. S. 550-566 (29:729); Union Pacific R. Co. v. Wyler, 154 U. S. 285-298 (39:983).

⁴¹ Glenn v. Sumner, 122 U. S. 152-157 (33:301).

⁴² Shippen v. Bowen, 122 U. S.

either the contract or the law, in order to maintain the action, it ought to be specially alleged, with the time and place of making it. The breach, in a declaration upon a contract, is either *negative*, that the defendant has not done something which he contracted to do, or procured it to be done by another, or that he has not done it, or procured it to be done, in a careful or proper manner; or it is *affirmative*, that he has done something which he contracted not to do, or suffered it to be done by another. It is not necessary that a breach of a contract be assigned in the very words of the contract; it is sufficient if a substantial breach be shown.⁴³ In actions for wrongs, the declaration should state the injury complained of; and in actions on the case, it should set forth by way of inducement the circumstances under which the injury was committed, and the consequential damages resulting therefrom to the plaintiff. The injury in actions for wrongs is immediate or consequential. Actions on the case lie to recover damages for consequential injuries, as for (1) malfeasance, or doing what the defendant ought not to do, or (2) nonfeasance, or not doing what he ought to do, or (3) misfeasance, or doing what he ought to do improperly. In such actions, the damages which the plaintiff has sustained, being the gist of the complaint, must be stated in the declaration. The damages are either general or special. General damages are such as naturally arise out of, or are connected with, and which the law implies or presumes to have accrued from the injury complained of; and special damages are such as really accrued and are not implied by law, and are either superadded to general damages arising from an act injurious in itself, or are such as arise from an act indifferent and not actionable in itself, but injurious only in its consequences, and they must be specially alleged.⁴⁴

§ 1002. The jurisdictional facts must be alleged.—In every action at law in the circuit courts of the United States, the plaintiff's declaration or complaint must contain a certain, distinct, direct and positive averment of all the facts upon

⁴³ 1 Tidd's Prac. (1807) 378–389; 1 Chitty, Pl. (12th Am. ed.) 290–360; Laws on Pl. (1811) 49, 76, 120, 157, 207, 231, 257; Fletcher v. Peck, 6 Cranch, 87 (3:162).

⁴⁴ 1 Tidd's Prac. (1807) 389–400; 1 Chitty, Pl. (12th Am. ed.) 395–399.

which the jurisdiction of the court, as a federal court, rests; it is not sufficient that the declaration should state a cause of action within the jurisdiction of a court of law, but it must go farther, and, by proper averments of facts, show that the action belongs to a class of cases over which the jurisdiction is, by the constitution and laws of the United States, vested in the federal circuit courts. This is an inflexible rule of federal pleading, not derived from common law rules, but arising out of, and having its reason and foundation in the peculiar nature of the federal government. Although that government is sovereign and supreme in its appropriate sphere of action, yet it does not possess all that power which usually belongs to the sovereignty of a nation, but is a government of certain specified powers, enumerated in the constitution, and conferred upon it by that instrument, and neither the legislative, executive nor judicial departments of the government can lawfully exercise any authority beyond the limits marked out by the constitution; and the constitution, in establishing and regulating the judicial department, particularly and specifically enumerates and defines the classes of cases in which the courts of the United States shall have jurisdiction, and they are not authorized to take cognizance of any case which does not come within the description therein specified; and, therefore, when a plaintiff sues in a court of the United States it is necessary that he should show, in his pleading, by the averment of facts, that the suit he brings is within the jurisdiction of the court, and that he is entitled to sue there, and, if he omits such averments from his pleading, the action will, upon demurrer, plea or motion, be dismissed, or should he, by any oversight of the circuit court, obtain a judgment in his favor, or should judgment be rendered in favor of defendant, such judgment will, upon writ of error, be reversed in the supreme court, and remanded with direction to dismiss the suit for want of jurisdiction in the circuit court, or with leave to amend so as to show jurisdiction where that can be done.⁴⁵

⁴⁵ *Scott v. Sandford*, 19 How. 393-633 (15:691) opinion of Chief Justice Taney; *Bingham v. Cabot*, 3 Dall. 382-384 (1:646); *Jackson v. Ashton*, 8 Pet. 148-150 (8:898);

Capron v. Van Noorden, 2 Cranch, 126-128 (2:229); *Montalet v. Murray*, 4 Cranch, 46-48 (2:545); *Thomas v. Board of Trustees of the Ohio State University*, 195 U.

S. 207-218 (49:160), stating the rule and collecting the authorities; *Kansas v. Colorado*, 206 U. S. 46-118 (51:956); *Minnesota v. Northern Securities Co.*, 194 U. S. 48 (48:870); *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449 (44:842).

In *Thompson v. Board of Trustees*, *supra*, Mr. Justice Harlan stated the rule as follows:

"That the jurisdiction of a circuit court of the United States is limited in the sense that it has no jurisdiction except that conferred by the Constitution and laws of the United States; that a cause is presumed to be without its jurisdiction unless the contrary affirmatively appears; that such jurisdiction, or the facts upon which, in legal intendment, it rests, must be distinctly and positively averred in the pleadings, or should appear affirmatively and with equal distinctness in other parts of the record, it not being sufficient that jurisdiction may be inferred argumentatively; and that, for the purposes of suing and being sued in a circuit court of the United

States, the members of a local corporation' are conclusively presumed to be citizens of the state by whose laws it was created, and in which alone the corporate body has a legal existence—are propositions so firmly established that further discussion of them would be both useless and inappropriate. * * *

"It is equally well established that when jurisdiction depends upon diverse citizenship, the absence of sufficient averments, or of facts in the record showing such required diversity of citizenship, is fatal and cannot be overlooked by the court, even if the parties fail to call attention to the defect, or consent that it may be waived. * * * 'Consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare and make such order as will prevent that court from exercising an authority not conferred upon it by statute.' "

CHAPTER XXIV.

PROCESS, SERVICE AND RETURN IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1003. Necessity for service of original process upon defendant.</p> <p>1004. Federal statutory requisites of the process for defendant.</p> <p>1005. Same — Same — Power of the circuit and district courts to make rules controlling process.</p> <p>1006. Process served by the marshal.</p> <p>1007. Service of process in personal action on a money demand.</p> | <p>§ 1008. Same—Service on foreign corporation.</p> <p>1009. Same—Service upon aliens and alien corporations.</p> <p>1010. Service in local suits where defendant resides in a district different from that in which the suit is brought.</p> <p>1011. Same—Substituted service upon non-resident defendants.</p> <p>1012. Return of the process.</p> <p>1013. Persons privileged from the service of process.</p> |
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§ 1003. Necessity for service of original process upon defendant.—The original writ at common law performed three offices or functions, namely: (1) It was the commencement of the action; (2) it commanded the sheriff to give the defendant personal notice of the demand or complaint against him; and (3) it commanded the sheriff to summon the defendant to appear in one of the superior courts of common law at a term named, and on a general return day, to defend the action.¹ It is a principle of the English common law, that to bind a defendant personally by a judgment when he has not been personally summoned would be contrary to the first principles of justice.² And it is now firmly established, as a principle of law of universal application, that in every action at law, seeking a personal judgment upon a money demand against the de-

¹ Stephen's Pl. (Philadelphia ed. 1824) 5, 6, 28, 29, 32, 56.

² Fisher v. Lane, 3 Wils. 297; Bissell v. Briggs, 9 Mass. 464;

Buchanan v. Rucker, 9 East, 192; Borden v. Fitch, 15 Johns. 121-146; Kilburn v. Woodworth, 5 Johns. 37.

fendant, whether a natural person or a corporation, there must be actual service of notice, within the limits of the state where the court sits, and within the jurisdiction of the court, upon the defendant, or upon some person authorized by him to accept service in his behalf, or the defendant must waive service of notice by entering a general appearance to the action, or by some other equally effectual method, before the court is authorized to render any personal judgment against him; and, in the absence of such service or waiver, any personal judgment rendered against the defendant is *coram non judice*, and absolutely null and void, and may be collaterally attacked, and no title to property passes by a sale under an execution issued upon any such judgment. There must be: (1) actual service of notice of the suit upon the defendant, or upon some person authorized by him to accept it in his behalf; or (2) there must be a waiver of service; and (3) where service is relied on to give the court jurisdiction of the person of the defendant, the service must be made within the territorial jurisdiction of the court, whether state or federal.³

³ *Pennoyer v. Neff*, 95 U. S. 714-748 (24:565); *Goldey v. Morning News*, 156 U. S. 518-526 (39:517); *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194-210 (37:699); *New Mexico ex rel Caledonia Coal Co. v. Baker*, 196 U. S. 434-446 (49:540); *St. Clair v. Cox*, 106 U. S. 350-360 (27:222); *United States v. American Bell Tel. Co.*, 29 Fed. R. 17; *New York Life Ins. Co. v. Bangs*, 103 U. S. 435-441 (26:580); *Connecticut Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602-622 (43:569); *Fitzgerald & Mallory Const. Co. v. Fitzgerald*, 137 U. S. 98-113 (34:608); *Thompson v. Whitman*, 18 Wall. 457-471 (21:897); *Wilson v. Seligman*, 144 U. S. 41-47 (36:338).

In *Goldey v. Morning News*, *supra*, Mr. Justice Gray, delivering the opinion of the court, said:

"It is an elementary principle of jurisprudence, that a court of

justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him or upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government, it cannot be recognized as valid by the courts of any other government. * * *

"For example, under the provisions of the constitution of the United States and of the acts of congress, by which judgments of the courts of one state are to be given full faith and credit in the courts of another state, or of the United States, such a judgment is not entitled to any force and effect, unless the defendant was

§ 1004. Federal statutory requisites of the process for defendant.—In all actions at law in the circuit courts of the United States, it is required by federal statute that the process to be served upon the defendant, giving him notice of the action, and summoning him to appear and defend, shall bear *teste* of the chief justice of the United States, or, when that office is vacant, of the associate justice next in precedence, and shall be under the seal, and signed by the clerk of the circuit court, and shall bear *teste* from the day of its issue.⁴

§ 1005. Same—Same—Power of the circuit and district courts to make rules controlling process.—The federal statutes make provision only for the testing, sealing, dating and signing of process,⁵ but it is not to be inferred that the other requisites of such writs and their service and return are to be absolutely controlled by the act of conformity. The circuit and district courts are given power by federal statute to “make rules and orders directing the returning of writs and processes, the filing of pleadings, the taking of rules, the entering and making up of judgments by default, and other matters in vacation, and otherwise regulate their own practice as may be necessary and

duly served with notice of the action in which the judgment was rendered, or waived the want of such notice. * * *

“If a judgment is rendered in one state against two partners jointly, after serving notice upon one of them only, under a statute of the state providing that such service shall be sufficient to authorize a judgment against both, yet the judgment is of no force or effect in a court of another state, or in a court of the United States, against the partner who was not served with process. * * *

“So a judgment rendered in a court of one state, against a corporation neither incorporated nor doing business within the state, must be regarded as of no validity in the courts of another state, or of the United States, unless service of process was made in the first

state upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another state, and only casually within the state, and not charged with any business of the corporation there. * * *

“The principle which governs the effect of judgments of one state in the courts of another state is equally applicable in the courts of the United States, although sitting in the state in which the judgment was rendered. In either case, the court the service of whose process is in question, and the court in which the effect of that service is to be determined, derive their jurisdiction and authority from different governments.”

⁴ U. S. Rev. Stat. secs. 911, 912;
4 Fed. Stat. Anno. 560, 561.

⁵ U. S. Rev. Stat. secs. 911, 912,
4 Fed. Stat. Anno. 560, 561.

convenient for the advancement of justice and the prevention of delays in proceedings;''⁶ and it has been held by the supreme court that this statute authorizing the federal courts to make rules was not superseded by the act of conformity, and that they may still make rules in regard to the issue, service and return of process for defendants, and that such rules need not strictly conform to the state statutes upon the subject, and that such courts need not alter their rules from time to time in subserviency to changes in the state law.⁷

§ 1006. Process served by the marshal.—The process requiring the appearance of the defendant is served by the marshal, and his deputies, of the judicial district in which the service is required by law to be made, and they are, in each state, vested with the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such state may have, by law, in executing the laws thereof.⁸ All unserved process remaining in the hands of a United States marshal or his deputies, when the marshal ceases to be such, shall be immediately delivered to the succeeding marshal upon request; and when a deputy United States marshal resigns or is removed he shall, upon request, deliver to the United States marshal for the district all process remaining in his hands.⁹ When the marshal or his deputy is a party in a cause, the writs, processes and precepts therein shall be directed to, and executed by some disinterested person appointed by the court or a judge thereof for that purpose.¹⁰

§ 1007. Service of process in personal action on a money demand.—In all personal actions at law, in the circuit courts of the United States, and of which those courts have jurisdiction concurrent with the courts of the several states, and in which a judgment *in personam* upon a money demand is sought to be obtained against the defendant, the process should be served upon him in person, within the judicial district in which the action is instituted, by the delivery to him in person a true copy of the writ.¹¹

⁶ U. S. Rev. Stat. sec. 918; 4 Fed. Stat. Anno. 585.

⁷ *Shepard v. Adams*, 168 U. S. 618-627 (42:602).

⁸ U. S. Rev. Stat. secs. 787, 788, 789, 790; 4 Fed. Stat. Anno. 159-163.

⁹ 30 U. S. Stat. at L. ch. 427, p. 1214; 4 Fed. Stat. Anno. 163.

¹⁰ U. S. Rev. Stat. sec. 922; 4 Fed. Stat. Anno. 587, 588.

¹¹ 25 U. S. Stat. at L. ch. 866, sec. 1, p. 433; *Toland v. Sprague*, 12 Pet. 300-338 (9:1093); *Levy v.*

An exception to this rule was created by the act of congress of May 4, 1858, providing that, suits not of a local nature, where there were two or more defendants, residing in different districts of the same state, might be brought in either district, and duplicate writs issued against the defendants, directed to the marshal of any district in which any defendant resides, and served on him there.¹² It has been thought by the bar, and contended in many cases, that this provision of the statute was repealed by the present judiciary act, but it has not been so declared by the courts.¹³ There are many special acts of congress regulating the venue of suits and the issue of process in particular districts, which constitute local exceptions to the general rule created by the general statute. These special acts are cited by states in a previous section, to which reference is here made.¹⁴

§ 1008. Same—Service on foreign corporations.—A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, and an officer of a corporation does not carry with him his functions as such officer when he leaves the state which created the corporation, and travels or stops temporarily in another state; and it is settled by the decisions of the supreme court of the United States, that foreign corporations can be served with legal process in personal actions within a state, (other than the one of its creation), only when they are doing business therein, and such service must be made upon an agent who represents the corporation in its business in that state, and cannot be made upon an officer or agent of the corporation, who resides in another state, and is only casually in the state where the service of process is sought to be made, and not charged with any business of the corporation there.¹⁵

In view of this rule, it is frequently important to determine

Fitzpatrick, 15 Pet. 167-172 (10:699); Herndon v. Ridgway, 17 How. 424, 425 (15:100); Chaffee v. Hayward, 20 How. 208-216 (15:851).

¹² U. S. Rev. Stat. sec. 740.

¹³ Petri v. Creelman Lumber Co., 199 U. S. 487-501 (50:281); Goddard v. Moeller, 80 Fed. R. 422; East. Tenn. V. & G. R. Co. v. Atlanta & F. R. Co., 49 Fed. R. 608.

¹⁴ Ante sec. 959; Petri v. Creel-

man Lumber Co., 199 U. S. 482-501 (50:281).

¹⁵ Peterson v. Chicago, Rock Island & Pacific R. Co., 205 U. S. 364-394 (51:841); Goldey v. Morning News, 156 U. S. 518-526 (39:517); New Mexico ex rel. Caledonia Coal Co. v. Baker, 196 U. S. 432-446 (49:540); Conley v. Mathieson Alkali Works, 190 U. S. 406-412 (47:1113); St. Clair v. Cox, 106 U. S. 350-360 (27:222);

what is meant by "doing business," within the meaning of the rule, and the question has been up often for adjudication. It has been held by the supreme court that, the fact that a foreign railway company, operating a line of railroad in an adjoining state, owns the controlling interest in the shares of stock of a domestic railway company, which operates its own line of road in the home state, both companies and their lines constituting elements of one railway system, the two companies having, to an important and material extent, common agents and employes, who are paid in proportion to the service performed for the companies respectively, by them, and are, while in the service of the companies, under the exclusive management and control of the company in whose services they are engaged, with no power in the companies to employ and discharge for each other, the service being kept distinct and separate in the control and payment of the employes, does not make the foreign corporation liable to service of process within the state upon the contention that it was doing business in the state through the agency of the domestic railway company. Nor, in such a case, are the officers and agents of the domestic company, domiciled in the state, the agents of the foreign company to receive service of process, because not representing it in respect to any business carried on there by it.¹⁶

A foreign insurance company which announces its withdrawal from a state in which it has been making contracts of insurance and issuing policies, and recalls its agents therefrom, and refuses to take any more risks or to issue any new policies within the state, and gives notice of its intention and action to the insurance commissioner of the state, but continues to collect the premiums through its former agents for that state on its outstanding policies and to settle the claims upon those policies as they accrue or fall due, is still doing business within the state, within the meaning of the rule which permits the service of process upon foreign corporations; and a regularly employed non-resident agent of the company who comes into the state with authority to investigate and settle a claim arising upon one of

Mexican Central Ry. Co. v. Pinkney, 149 U. S. 194-210 (37:699); Ex parte Schallenberger, 96 U. S. 366-369 (24:853); ante sec. 934.

¹⁶ Peterson v. Chicago, Rock Island & Pacific R. Co., 205 U. S. 364-394 (51:841).

its policies, when he is not a mere special agent for the particular case, but is employed in all similar cases, is deemed in law the agent of the company for the purpose of receiving service of process in a suit brought against the company to collect the claim.¹⁷

§ 1009. Same—Service upon aliens and alien corporations.—The provision contained in the first section of the judiciary act, fixing the venue of suits, has no application to suits against aliens and alien corporations; and suits may be maintained against them by citizens of the states of the union in any circuit court of the United States within whose territorial jurisdiction the defendant may be found at the time of the service of the process, and service upon the financial agent of an alien corporation within the jurisdiction of the court is a sufficient service upon the corporation, and no statutory authority is necessary to enable such agent to receive such service.¹⁸

§ 1010. Service in local suits where defendant resides in a district different from that in which the suit is brought.—In suits of a local nature, where a defendant resides in a different district, in the same state, from that in which the suit is brought, the plaintiff may have original and final process directed to and executed by the marshal of the district in which such defendant resides. This rule, established by statute, is applicable alike to both actions at law and suits in equity, when they are local in character.¹⁹

§ 1011. Same—Substituted service upon non-resident defendants.—When, in any action at law or suit in equity in any circuit court of the United States to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property, situated within the district where the suit is brought, any defendant is a non-resident of the state, the plaintiff may have substituted service on such defendant, as provided in section 8, of the ju-

¹⁷ Connecticut Mutual Life Ins. Co. v. Spratley, 172 U. S. 602-622 (43:569).

¹⁸ Re Hohorst, 150 U. S. 653-654 (37:1211); Barrow Steamship Co. v. Kane, 170 U. S. 100-113 (42:964).

¹⁹ U. S. Rev. Stat. secs. 741, 742; 4 Fed. Stat. Anno. 555, 556; U. S. Comp. Stat. 1901, p. 588; Memphis Sav. Bank v. Houchens (C. C. A.) 115 Fed. R. 96; ante sec. 955.

diciary act of March 3, 1875, but no personal judgment can be rendered against such absent defendant not appearing.²⁰

§ 1012. Return of the process.—The marshal's return of the process should show affirmatively that it was executed within the judicial district where the suit was instituted and is pending,²¹ and should show, in like manner, every fact and act which is, under the law, essential to a good and valid service of the process upon the defendant.²²

The court may, in the exercise of a sound discretion, allow the marshal to amend his return, so as to make it conform to the real facts.²³

§ 1013. Persons privileged from the service of process.—Senators and representatives in congress are, during their attendance at the session of their respective houses, and in going to and returning from the same, privileged and exempt from the service of civil process upon them, although not accompanied with arrest of the person; and the same rule applies to non-residents coming into a state as litigants or witnesses, while in good faith attending to their duties as such, and during the time fairly occupied in going to and returning from the place where such duties are to be performed; and like protection is afforded to a person who has been induced by fraudulent means to come within the jurisdiction of a court for the purpose of obtaining service of process upon him.²⁴

²⁰ 18 U. S. Stat. at L. ch. 137, sec. 8, pp. 470-473; 25 U. S. Stat. at L. ch. 866, sec. 5, p. 433; 4 Fed. Stat. Anno, 380-381; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352-371 (33:178); *Greely v. Lowe*, 155 U. S. 58-76 (39:69); *Dick v. Foraker*, 155 U. S. 401-416 (39:201); *Arndt v. Griggs*, 134 U. S. 316-329 (33:918); *Jellinek v. Huron Mining Co.*, 177 U. S. 1-14 (44:647); *Citizens' Savings & Trust Co. v. Illinois Central Railroad Co., et al.*, 205 U. S. 46-59 (51:703); *Bronson v. Keokuk*, 2 Dill. 498, Fed. Cas. No. 1,928; *Forsyth v. Pierson*, 9 Fed. R. 801; *Batt v. Proctor*, 45 Fed. R. 515; *Meyer v.*

Kuhn, 65 Fed. R. 712; Ante sec. 955; 1 Bates, Fed. Eq. Proc. secs. 48, 96 and 158, where substituted service in local actions is discussed at length.

²¹ *Allen v. Blount*, 1 Blatchf. 480-487, Fed. Cas. No. 215; *Thayer v. Wales*, 5 Fish. Pat. Cas. 448, Fed. Cas. No. 13,872.

²² *Settlemier v. Sullivan*, 97 U. S. 444-450 (24:1110).

²³ *Phoenix Ins. Co. v. Wulf*, 1 Fed. R. 775-779; *Poweshiek County v. Durant*, 9 Wall. 736 (19:813).

²⁴ 1 Bates, Fed. Eq. Proc. sec. 159, where the rule is fully stated, and the authorities collected.

CHAPTER XXV.

THE APPEARANCE OF THE DEFENDANT IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1014. Two methods of obtaining jurisdiction over person of the defendant.</p> <p>1015. Appearance at common law.</p> <p>1016. Two kinds of appearances in federal procedure—General and special—Same at common law.</p> <p>1017. General appearance defined—Its effect.</p> <p>1018. What constitutes a general appearance.</p> <p>1019. A general appearance cannot be withdrawn without leave of court.</p> | <p>§ 1020. Special appearance defined.</p> <p>1021. Same—A state statute giving to a special appearance the effect of a general appearance not binding on the federal courts.</p> <p>1022. A petition for removal is a special appearance only.</p> <p>1023. Absence of jurisdiction over subject-matter not waived by general appearance.</p> <p>1024. Parties may appear by themselves or attorneys.</p> |
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§ 1014. **Two methods of obtaining jurisdiction over person of the defendant.**—In actions at law, and by the rules of the common law, there are two methods of obtaining jurisdiction over the person of the defendant, namely: (1) By a legal and valid service of process upon him within the territorial jurisdiction of the court, and (2) by his voluntary general appearance in the action, either by himself or by his duly authorized attorney.¹

§ 1015. **Appearance at common law.**—By the ancient common law, the defendant was, as a general rule, required to make an actual and personal appearance in court in term time, and could not appear by attorney without the king's special warrant, by writ or letters patent. A corporation aggregate, however, not being capable of a personal appearance, could only appear by attorney, appointed under its common seal. By the statute of Westm. 2, a general liberty was given to parties to appear by attorney; but for a long time after the enactment of

¹ Cooper v. Reynolds, 10 Wall. 308-321 (19:931); Mexican Central R. Co. v. Pinkney, 149 U. S. 194-210 (37:210).

that statute, an actual and personal appearance in open court, either by the attorney or the defendant, was requisite. At length the rule requiring an *actual appearance* was relaxed, and the appearance of the defendant was effected and expressed by a formal entry upon the court record;² and, in modern times, the appearance was expressed in the beginning of the defendant's plea, in the words, "and the said defendant, by his attorney, *comes and defends* the wrong, or force, and injury," and the defense without the "*venit*" was a good appearance, for the defendant's making defense shows him to be in court, and makes him a party to the plea.³

§ 1016. **Two kinds of appearances in federal procedure—General and special—Same at common law.**—In federal procedure, there are two kinds or classes of appearances, materially different from each other in their nature, purposes and effect, namely: (1) General appearances,⁴ and (2) special or limited appearances.⁵ This classification existed in the English common law procedure, and arose out of the distinction between (1) pleas to the jurisdiction of the court, (2) pleas in abatement of the action, and (3) pleas in bar of the action.⁶

§ 1017. **General appearance defined—Its effect.**—A general appearance may be defined to be the process, proceeding, or act,

² Stephen, Pl. (Philadelphia ed. 1824) 5, 28, 29, 32, 56; 1 Tidd's Prac. (1807) 62, 63.

³ 1 Chitty, Pl. (12th Am. ed.) 427, 428; Young v. Rankins, 4 How. (Miss.) 27; Jones v. Hunter, 4 How. (Miss.) 342; Harris v. Gwin, 10 Smed. & M. (Miss.) 563; Henderson v. Hamer, 5 How. (Miss.) 525; Solomon v. Tupelo Compress Co., 70 Miss. 822.

⁴ St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127-132 (35:659); Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98-113 (34:608); Toland v. Sprague, 12 Pet. 300-330 (9:1093); Creighton v. Kerr, 20 Wall. 8-14 (22:309); Eldred v. Bank, 17 Wall. 545-553 (21:685); Knox v. Summers, 3 Cranch, 496-

498 (2:510); Pollard v. Dwight, 4 Cranch, 421-433 (2:666); Bank v. Morgan, 132 U. S. 141-146 (33:282).

⁵ Harkness v. Hyde, 98 U. S. 476-479 (25:237); Southern Pacific Co. v. Denton, 146 U. S. 202-210 (36:942); Mexican Central R. Co. v. Pinkney, 149 U. S. 194-210 (37:699); Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales, 151 U. S. 496-520 (38:248); Goldey v. Morning News, 156 U. S. 518-526 (39:517); Wabash Western Railway v. Brow, 164 U. S. 271-280 (41:431); National Accident Society v. Spiro, 164 U. S. 281 (41:435).

⁶ 1 Chitty, Pl. (12th Am. ed.) 456.

by which a person against whom an action at law has been instituted submits himself and his person to the jurisdiction of the court for all the purposes of the action, and may be made by either himself or his authorized attorney; and, in the circuit courts of the United States, a general appearance waives all defects in the process and its service and return, and, indeed, the failure to issue process, and waives all special privileges of the defendant in respect to the particular court and judicial district in which the action is brought, if it be one of which the court can take jurisdiction.⁷

§ 1018. What constitutes a general appearance.—If, in an action at law, in a circuit court of the United States, the defendant appears generally, or appears and files a motion to quash or set aside the service of process upon him for invalidity or illegality, without expressly limiting his appearance to the single purpose of objecting to the jurisdiction of the court over him; or if he pleads to the merits in the first instance, or demurs to the declaration or complaint upon the ground that it states no cause of action, or upon the ground that the court has no jurisdiction of the subject matter; or appears and participates in the trial, introducing witnesses, asking and obtaining instructions, and arguing the case on its merits to the jury, he thereby enters a general appearance to the merits, and cannot thereafter challenge the jurisdiction of the court over him, if it have jurisdiction of the subject matter.⁸

§ 1019. A general appearance cannot be withdrawn without leave of court.—When the defendant has, by either himself or his authorized attorney, entered a general appearance to the action, he cannot withdraw it nor change it into a special ap-

⁷ *Eldred v. Bank*, 17 Wall. 545-553 (21:685); *Creighton v. Kerr*, 20 Wall. 8-14 (22:309); *St. Louis & San Francisco R. Co. v. McBride*, 141 U. S. 127-132 (35:659); *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 91-113 (34:608); *Toland v. Sprague*, 12 Pet. 300-330 (9:1093); *Bank v. Morgan*, 132 U. S. 141-146 (33:282).

⁸ *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S.

98-113 (64:608); *St. Louis & San Francisco R. Co. v. McBride*, 141 U. S. 127-132 (35:659); *Bank v. Morgan*, 132 U. S. 141-146 (33:282); *Toland v. Sprague*, 12 Pet. 300-330 (9:1093); *Eldred v. Bank*, 17 Wall. 545-553 (21:685); *Creighton v. Kerr*, 20 Wall. 8-14 (22:309); *Knox v. Summers*, 3 Cranch, 496-498 (2:510); *Pollard v. Dwight*, 4 Cranch, 421-433 (2:666); *Hill v. Mendenhall*, 21 Wall. 453-456 (22:616).

pearance without leave of the court, obtained upon due notice to the adverse party; and the withdrawal, by a defendant of his plea or answer to the merits, which he has voluntarily filed in the cause, without the service of process upon him, is not a withdrawal of his appearance, and does not deprive the court of its jurisdiction, obtained by the appearance, to render a personal judgment against him.⁹

§ 1020. Special appearance defined.—In the law of federal procedure, a special appearance is a proceeding, made of record, by which the defendant appears, expressly, for the special and single purpose of challenging the jurisdiction of the court over him, with the right, if his objection should be overruled, to except to the ruling of the court, and then to plead to the merits of the cause, without waiving the jurisdictional objection, or precluding him from urging it in the appellate court. The essential element of a special appearance is that it is expressly limited and restricted to the special and single purpose of objecting to the jurisdiction of the court over the person of the defendant, and is most usually based upon the invalidity and illegality of the service of process upon him. In all cases where the defendant's counsel deem the service of process insufficient, invalid, or illegal, or the return as false, he should, in the first instance, enter a special appearance for the sole purpose of making the objection, and then file his plea to the jurisdiction, or a motion to quash or set them aside, and if it should be overruled he should reserve an exception to the action of the court, and he may then plead to the merits without waiving the objection, and if cast in the suit he may prosecute a writ of error from the judgment directly to the supreme court of the United States upon the question of jurisdiction alone under the fifth section of the judiciary act of March 3, 1891.¹⁰

⁹ *Eldred v. Bank*, 17 Wall. 545-553 (21:685); *Creighton v. Kerr*, 20 Wall. 8-14 (22:309); and see also, *United States v. Curry*, 6 How. 106-114 (12:363); *United States v. Armejo*, 3 Wall. 704 (18:247).

¹⁰ *Harkness v. Hyde*, 98 U. S. 476-479 (25:237); *Southern Pacific Co. v. Denton*, 146 U. S. 202-

210 (36:942); *Mexican Central R. Co. v. Pinkney*, 149 U. S. 194-210 (37:699); *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U. S. 496-520 (38:248); *Goldey v. Morning News*, 156 U. S. 518-526 (39:517); *Wabash Western Railway v. Brow*, 164 U. S. 271-280 (41:431); *National Accident Society v. Spiro*, 164 U. S.

§ 1021. **Same—A state statute giving to a special appearance the effect of a general appearance not binding on the federal courts.**—The jurisdiction of the circuit courts of the United States, both as to subject matter and over the persons of defendants by service of process or otherwise has been defined and limited by congressional legislation, and can neither be restricted nor enlarged by the statutes of a state; and, notwithstanding the act of conformity, a state statute which gives to a special appearance, made by a defendant to challenge the court's jurisdiction over him, the force and effect of a general appearance, so as to confer jurisdiction, is not binding on the federal courts held in that state, and will be wholly disregarded. The provisions of the judiciary act prescribing in what districts actions shall be brought, manifest the intention of congress that they shall be brought and tried in such districts only, and that no defendant shall be compelled to appear and answer in any other district than that prescribed by law; and congress cannot have intended that it should be within the power of a state, by its statutes to prevent a defendant, sued in a district in which he is not compellable by the act of congress to answer, from obtaining from the circuit court a determination of his exemption from suit in such district, in the first instance, and then by the supreme court, upon writ of error, if the trial court should decide the question adversely to him. For a federal circuit court to conform to such a state statute, would be to allow a state to annul the valid laws of the congress of the United States, and to regulate the exercise of the judicial power of the United States.¹¹

§ 1022. **A petition for removal is a special appearance only.** A petition for the removal of a cause from a state court into a federal circuit court is not a general appearance, but a special appearance only; and this is true whether the petition expresses that the defendant appears specially and solely for the purpose of presenting the application for the removal of the cause, or whether the petition is in general terms, without words specify-

¹¹ 281 (41:435); *Shepard v. Adams*, 168 U. S. 618-627 (42:602).

¹¹ *Southern Pacific Co. v. Denton*, 146 U. S. 202-210 (36:942); *Mexican Central R. Co. v. Pink-*

ney, 149 U. S. 194-210 (37:699); *Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales*, 151 U. S. 496-520 (38:248).

ing and restricting the purpose of the defendant's appearance in the state court to a removal; and in either case, after the cause has been removed to the circuit court the defendant may enter a special appearance there for the purpose of challenging the jurisdiction of the court over, or objecting to the legality of the service of process, upon him. The right of a defendant to a removal, when it exists at all, is a statutory right, and he is obliged, in order to assert the right, to pursue the remedy prescribed by the federal statute, and when he confines himself to the enforcement of that right in the manner prescribed, he ought not to be held to have voluntarily waived any other right he possesses. The right of removal, and the right of the defendant to challenge the jurisdiction of the court over him, are separate and distinct rights. They cannot be confused or confounded. The removal carries the whole case into the federal court, just as it existed in the state court. A part of the case is the right of defendant to object to the jurisdiction. By the removal, he refuses to submit that right to the state court, or to allow it to pass upon it, and he should be permitted to submit it to the federal circuit court when the removal has been perfected and the transcript filed. Such the supreme court has declared to be the law and the right of the removing defendant.¹²

§ 1023. Absence of jurisdiction over subject-matter not waived by general appearance.—Under the judiciary act now in force, a general appearance does not waive the absence or want of jurisdiction of the court over the subject-matter of the action or suit; and although the defendant appears generally and pleads to the merits in the first instance, yet if the suit does not really and substantially involve a controversy of which the circuit court may take cognizance—that is, if the court in truth and in fact has no jurisdiction of the subject-matter—the jurisdictional objection may be raised at any time before the case is finally disposed of by the circuit court.¹³

¹² *Goldey v. Morning News*, 156 U. S. 518-528 (39:517); *Wabash Western Railway v. Brow*, 164 U. S. 271-280 (41:413); *National Accident Society v. Spiro*, 164 U. S. 281 (41:435).

¹³ *Morris v. Giles*, 129 U. S. 315-329 (32:690); *Williams v. Nottoway*, 104 U. S. 209-213 (26:719); *Wetmore v. Rymer*, 169 U. S. 115-128 (42:682).

§ 1024. Parties may appear by themselves or attorneys.—In all the courts of the United States, the parties may plead and manage their own causes personally, or by the assistance of such counsel or attorneys at law, as by the rules of the said courts, respectively, are permitted to manage and conduct causes therein.¹⁴

¹⁴ U. S. Rev. Stat. sec. 747; 4 Fed. Stat. Anno. 556.

CHAPTER XXVI.

THE DEFENSES OF DEFENDANT IN A SUIT AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1025. Preparing the defense.</p> <p>1026. Classification of defenses to suits at law.</p> <p>1027. Same—plea in suspension of the suit.</p> <p>1028. Same — These defenses exist in two forms.</p> <p>1029. Defenses to the jurisdiction are of two classes.</p> <p>1030. Pleas in abatement.</p> <p>1031. Plea in bar defined.</p> <p>1032. Classification of pleas in bar.</p> <p>1033. Form and order of pleading the three defenses —Common law procedure—Code procedure.</p> <p>1034. Defendant's defense must conform to state procedure—Important exception.</p> | <p>§ 1035. Same—Plea to jurisdiction over person separately presented—Illustration.</p> <p>1036. Same — Same — Coupled with a demurrer to the merits.</p> <p>1037. Plea denying jurisdiction of subject matter presented in general answer.</p> <p>1038. Equitable defenses cannot be pleaded to actions at law.</p> <p>1039. Resume.</p> <p>1040. Cross-demands in actions at law available in federal circuit courts.</p> <p>1041. Equitable cross-demands cannot be pleaded in an action at law.</p> |
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§ 1025. **Preparing the defense.**—The plaintiff having filed his declaration or complaint, and process having been served and returned, “it is for the defendant to concert the manner of his defense,” and this he does by the aid of his attorney and counsel. This labor and duty involve the investigation of the facts and law of the case, and the examination and consideration of the defenses which the law permits to be interposed to such actions; and the counsel is then prepared to advise that line of defense which accords with the law, the truth and a sound and judicious policy.¹ A mistake at this point is often fatal, resulting in the defendant's being defeated in the litigation, when he would otherwise be successful; as, for an instance, it

¹ Stephen. on Pl. (Philadelphia ed. 1824) 60, 61.

frequently occurs that the court has not acquired jurisdiction over the person of the defendant, but he waives it by pleading, in the first instance, to the merits, and is then upon the trial cast in the suit.² In preparing defenses to actions, and especially in the federal circuit courts, it is important to keep in mind the various classes of defenses which may be by law interposed to them.

§ 1026. Classification of defenses to suits at law.—All defenses to suits at common law, within the meaning of those words as used in the federal constitution and laws, are embraced in three general classes, namely: (1) Defenses to the jurisdiction of the court; (2) defenses in abatement or suspension of the suit; and (3) defenses to the merits of the suit, and in bar of it.³ All defenses fall within some one of these classes, whether in the common law or code systems of pleading. The classification arises, necessarily, out of the nature of judicial controversies, and its existence is evidenced by every page of the reported decisions in this country.

§ 1027. Same—Plea in suspension of the suit.—A fourth class of defense—called a plea “in suspension of the action”—is laid down in the books, but it is really in its nature and so termed a plea in abatement.⁴ It is defined as follows:

“A plea in suspension of the action is one which shows some ground for not proceeding in the suit at the present period, and prays that the pleading may be stayed, until the ground be removed. The number of these pleas is small. Among them is that which is founded on the nonage of one of the parties, and is termed *parol demurrer*.”⁵

§ 1028. Same—These defenses exist in two forms.—In the development of the science of pleading, it was found that these three classes of defenses—defenses to the jurisdiction, in abatement, and in bar—existed and were available to the defendant in two forms, namely: (1) if the defense arises out of a defect appearing on the face of plaintiff’s declaration, without refer-

² St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127-132 (35:659); Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98-113 (34:608). 440-474; 1 Tidd’s Prac. (1807) 572-590.

⁴ 1 Chitty, Pl. (12th Am. ed.) 447.

⁵ Stephen on Pl. (Philadelphia ed. 1824) 64.

1 Chitty, Pl. (12th Am. ed.)

ence to extrinsic matter it is interposed by *demurrer*, by which the defendant challenges the legal sufficiency of the plaintiff's pleading, and presents an issue of law; and (2) if the defense does not arise out of any defect appearing upon the face of the declaration, it must be brought forward by a denial of the averments of the facts in the plaintiff's declaration, or by the averment of other facts, or both, and this presents an issue of fact, and in such case the defendant is said to *plead* to the declaration.⁶

§ 1029. **Defenses to the jurisdiction are of two classes.**—In actions at common law, defenses to the jurisdiction are of two classes, namely: (1) defenses which deny the jurisdiction of the court over the person of the defendant;⁷ and (2) defenses which deny the jurisdiction of the court over the subject-matter of the suit.⁸ These defenses may be interposed by demurrer,⁹ or plea,¹⁰ according as the jurisdictional objection does or does not appear on the face of plaintiff's declaration, complaint or petition, without reference to extrinsic matter. Jurisdictional objections of the first class may be waived,¹¹ but those of the

⁶ 1 Chitty, Pl. (12th Am. ed.) 440-474, 661-670; Stephen on Pl. (Philadelphia ed. 1824) 60-63; 1 Tidd's Prac. (1807), 647.

⁷ Harkness v. Hyde, 98 U. S. 476-479 (25:237); Southern Pacific Co. v. Denton, 146 U. S. 202-210 (36:942); Mexican Central R. Co. v. Pinkney, 149 U. S. 194-210 (37:699); Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales, 151 U. S. 496-520 (38:248); Goldey v. Morning News, 156 U. S. 518-526 (39:517); Wabash Western Railway v. Brow, 164 U. S. 271-280 (41:431); Peterson v. Chicago, Rock Island & Pacific R. Co., 205 U. S. 364-394 (51:841); New Mexico ex rel. Caledonia Coal Co. v. Baker, 196 U. S. 432-466 (49:540); Conley v. Mathleson Alkali Works, 190 U. S. 406-412 (47:1113); St. Clair v. Cox, 106 U. S. 350-360 (27:222).

⁸ Scott v. Sandford, 19 How. 393-633 (15:691); Slater v. Mexican National R. Co., 194 U. S. 120-135 (48:900).

⁹ Southern Pacific Co. v. Denton, 146 U. S. 202-210 (36:942).

¹⁰ Mexican Central Ry. Co. v. Pinkney, 149 U. S. 194-210 (37:699); Galveston, Harrisburg & San Antonio Ry. Co. v. Gonzales, 151 U. S. 496-520 (38:248); Peterson v. Chicago, Rock Island & Pacific R. Co., 205 U. S. 364-394 (51:841); Slater v. Mexican National R. Co., 194 U. S. 120-135 (48:900); Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540-547 (47:1171).

¹¹ St. Louis & San Francisco R. Co. v. McBride, 141 U. S. 127-132 (35:659); Fitzgerald & Mallory Construction Co. v. Fitzgerald, 137 U. S. 98-113 (34:608).

second class cannot be waived¹² under any circumstances, nor by any means.

§ 1030. Pleas in abatement.—A plea in abatement is one which does not deny the jurisdiction of the court, nor that plaintiff has a cause of action, but alleges some fact or facts which show that, because of some defect in the suit as brought, it should be delayed, or dismissed without an adjudication of the rights claimed by the plaintiff. The most ordinary subjects of this plea are the disability of the parties to sue or be sued; the want of parties; misjoinder of parties; and another suit pending. The effect of all pleas in abatement, if successful, is, that the particular suit is suspended or defeated; but the right of suit itself is not gone, and the plaintiff, on obtaining a “better writ,” may maintain a new one, or proceed with the old one, when the disability is removed, if it were merely suspended.¹³

§ 1031. Plea in bar defined.—A plea in bar of an action may be defined as one which shows some ground for barring or defeating the action; it shows either that the plaintiff never had any cause of action, or, if he had, that it has been discharged by some subsequent matter. A plea in bar goes to the merits of the case, and denies that the plaintiff has any cause of action, and does not, like a plea in abatement, give a better writ. A plea in bar is, therefore, distinguished from all pleas of the dilatory class, as impugning the right of action altogether, instead of merely tending to divert the proceedings to another jurisdiction, or suspend them, or abate the particular suit. It is, in short, a substantial and conclusive answer to the action.¹⁴

§ 1032. Classification of pleas in bar.—All pleas in bar of actions at law are embraced in three general classes, namely: (1) pleas by way of traverse or denial, either general or special; (2) pleas by way of confession and avoidance, admitting the

¹² *Morris v. Giles*, 129 U. S. 315-329 (32:690); *Williams v. Nottaway*, 104 U. S. 209-213 (26:719); *Wetmore v. Rymer*, 169 U. S. 115-128 (42:682); *Minnesota v. Northern Securities Co.*, 194 U. S. 48-73 (48:870).

¹³ *Stephen Pl.* (Philadelphia ed. 1824) 65-70; 1 *Tidd's Prac.*

(1807) 578; 1 *Chitty. Pl.* (12th Am. ed.) 446-465; *Hatch v. Spofford*, 22 Conn. 485.

¹⁴ *Stephen Pl.* (Philadelphia ed. 1824) 70, 71; 1 *Tidd's Prac.* (1807) 590; 1 *Chitty, Pl.* (12th Am. ed.) 469; *Gould's Pl.* (3rd ed.) ch II, sec. 39.

truth of plaintiff's allegations, but avoiding them by alleging new matter; and (3) pleas which neither admit nor deny the facts averred in plaintiff's declaration or complaint, but allege some matter of estoppel which, being inconsistent with his allegations, preclude him from availing himself of them.¹⁵ Whatever may be the form of defensive allegations prescribed in any particular jurisdiction, all defenses in bar of the action must, from the very nature of judicial controversies, fall within one of these classes. There may be confusion and want of logical order in the statement, but, upon strict analysis, the classification here stated will be found of universal application.

§ 1033. Form and order of pleading—The three defenses—Common law procedure—Code procedure.—By the common law system of pleading, the three defenses—(1) pleas to the jurisdiction of the court, (2) pleas in abatement of the action, and (3) pleas in bar of the action—are pleaded and disposed of separately and successively in the order just stated. That is what is called the “due order of pleading,” according to that system; if the plea in abatement is filed out of its due order, that is, before a plea to the jurisdiction has been filed and disposed of, it admits the jurisdiction of the court; if the plea in bar is filed out of its due order, that is, before pleas to the jurisdiction and in abatement have been filed and disposed of, it waives any jurisdictional objection, and all matters in abatement.¹⁶ Such is the method and the due order of pleading, according to the common-law system, and it prevailed in the circuit courts of the United States prior to the adoption of what is known as the act of conformity.¹⁷

But, under the code procedure of the state of New York, and of those states which have copied it, the common law method and order of pleading have been abolished, and the three defenses are pleaded together and collectively, in one paper called an answer. This answer takes the place of all pleas at common

¹⁵ Stephen Pl. (Philadelphia ed. 1824) 239, 240; 1 Tidd's Prac. (1807) 590; 1 Chitty, Pl. (12th Am. ed.) 469; Gould's Pl. (3rd ed.) ch. II. sec. 39.

¹⁶ 1 Tidd's Prac. (1807) 572; 1 Chitty, Pl. (12th Am. ed.) 440-468;

Gould's Pl. (3rd ed.) ch. II, secs. 31-37.

¹⁷ Sheppard v. Graves, 14 How. 505-513 (14:518); Scott v. Sandford, 19 How. 393-633 (15:691); Roberts v. Lewis, 144 U. S. 653-658 (36:579); Society v. Pawlet, 4 Pet. 480 (7:927).

law, whether to the jurisdiction of the court, or in abatement of the action, or to the merits and in bar of the action, and whether general or special; and a positive denial in the answer of each and every allegation in the complaint or petition puts in issue every material allegation therein contained, as fully as if it had been specifically and separately denied; and an objection that the court has no jurisdiction of the person of the defendant, or of the subject-matter of the action, may be taken by demurrer if it appears upon the face of the petition, and by the answer if it does not so appear. And, under the code system, issues of fact as to the jurisdiction of the court over the person of the defendant, and over the subject-matter of the action, and issues of fact upon matters of abatement, and issues of fact upon the merits and in bar of the action, may all be collectively and simultaneously presented in and by one pleading, called the answer.¹⁸

§ 1034. Defendant's defense must conform to state procedure—Important exception.—In all actions at common law, in the federal circuit courts, the pleading or pleadings of the defendant, by which he presents his defenses to plaintiff's declaration or complaint, must, with one important exception to be presently stated, conform to the requirements of the state procedure, in "like causes," of the state in which such courts are respectively held, including the form and order of pleading, and the method of stating the facts which constitute the defenses, and of interposing denials.¹⁹ The important exception to this rule is, that, notwithstanding the law of state procedure to the contrary, a plea or objection to the jurisdiction of the court over the person of the defendant must always be pleaded or presented separately and in the first instance, under a special appearance, entered for the special and single purpose of presenting the objection; and a plea or objection to the jurisdiction of the court over the person of the defendant cannot be presented in a general answer, nor after a defense to the merits, by either plea or demurrer, nor can such jurisdictional objection

¹⁸ *Roberts v. Lewis*, 144 U. S. 653-658 (36:579).

¹⁹ *Roberts v. Lewis*, 144 U. S. 653-658 (36:579); *Glenn v. Sumner*, 132 U. S. 152-157 (33:301); *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36:162);

Chemung Canal Bank v. Lowery 93 U. S. 72-78 (23:806); *Robertson v. Perkins*, 129 U. S. 233-238 (32:686); *Forsyth v. Doolittle*, 120 U. S. 73-78 (30:586); *Depurton v. Young*, 134 U. S. 241-260 (33:923); ante secs. 977 and 1020.

over the person be presented in connection with any such defense to the merits; for the objection that the court has not acquired jurisdiction over the person of the defendant, or that he is sued in the wrong district, is one that may be waived, and it is waived unless presented and determined under a special appearance, before any defense to the merits is interposed.²⁰

§ 1035. Same—Plea to jurisdiction over person separately presented—Illustration.—It was shown in the section next preceding, that the federal circuit courts will not conform to a state rule of procedure which permits a plea to the jurisdiction of the court over the person of the defendant after he has pleaded to the merits, or which allows such plea to be presented together with a defense to the merits. This rule of the federal courts is well illustrated by a case which was tried in the circuit court of the United States for the district of Nebraska, from whose final judgment a writ of error was prosecuted to the supreme court.

By the code of civil procedure of that state, which is modeled upon the code of New York, every civil action is commenced by petition, which must contain the name of the court and county in which the action is brought, and the names of the parties, plaintiff, and defendant, a statement of the facts constituting the cause of action, and a demand of the relief to which the party supposes himself entitled. And it is further provided that the defendant may demur to the petition for certain enumerated matters appearing on its face, among which are “that the court has no jurisdiction of the person of the defendant, or the subject-matter of the action,” and “that the petition does not state facts sufficient to constitute a cause of action,” and the demurrer must specify the grounds of objection, or else be regarded as limited to the latter ground only; and, when any of the defects enumerated do not appear upon the face of the petition, the objection may be taken by answer, which must contain a general or specific denial of each material allegation of the petition controverted by the defendant, and a statement of any new matter constituting a defense. The answer takes the place of all pleas at common law, whether general or special,

²⁰ *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98-113 (34:608); *St. Louis & San Francisco Ry. Co. v. McBride*, 141 U. S. 127-132 (35:659).

to the jurisdiction of the court over the person of the defendant or the subject-matter of the action, in abatement or in bar of the action; and a positive denial in the answer of "each and every allegation in the petition" puts in issue every material allegation therein contained, as fully as if it had been specifically and separately denied. An objection that the court has no jurisdiction, either of the person of the defendant, or of the subject matter of the action, may, in the state courts of Nebraska, under this procedure, be taken advantage of by demurrer, if it appears on the face of the petition, which may be filed with a demurrer that the petition states no cause of action, and if these objections do not appear upon the face of the petition they may be taken by answer.²¹

In a suit at law, in that state, in one of its own courts, by a citizen thereof, against a foreign corporation, not doing business in the state, and upon which no valid service of process was made, the defendant appeared in the state court and demurred for misjoinder and want of parties and also because the petition did not state a cause of action. Afterward the defendant removed the case into the circuit court of the United States, and upon leave of the court, filed an amended answer which contained (1) pleas in bar of the action, (2) that the court had no jurisdiction over the person of the defendant, and (3) no jurisdiction over the subject matter. Upon the trial, the defendant filed a plea to the jurisdiction of the court over it, setting up specially the illegality of the process, which was overruled; and defendant then filed a motion for a nonsuit, upon the ground that neither the state court nor the federal circuit court had or could take jurisdiction over it or the action, which motion was overruled. The trial was concluded upon the merits and judgment rendered against the defendant. Upon writ of error, the supreme court held that there was no valid service of process upon the defendant, that the attempted service was illegal, and should have been set aside upon a proper motion; but no such motion was made, and the defendant, by appearing and pleading to the merits, although accompanied by demurrers and pleas to the jurisdiction over him, as permitted by the state procedure,

²¹ *Roberts v. Lewis*, 144 U. S. 653-658 (36:579); *Depurton v. Young*, 134 U. S. 241-260 (33:923).

was a waiver of the jurisdictional objection, and a general appearance, and a submission of itself to the jurisdiction of the court, rendering it liable to a personal judgment, although the suit as commenced was in its essential nature a proceeding *in rem*. It will be noted that the objection of the defendant, that jurisdiction over its person was not acquired by the service of the process was held by the supreme court to be a valid one, and that the objection was presented in the state court before removal, and in the federal court after removal, together with defenses in abatement and in bar, in accordance with the procedure prescribed by the code of Civil Procedure of the state of Nebraska; but, not being presented separately, in the first instance, under a special appearance, the objection was waived.²²

§ 1036. Same—Same—Coupled with a demurrer to the merits.—Where an action was commenced against a foreign railroad corporation, by the filing of a petition, and no process was issued, but the defendant filed a demurrer to the petition, upon the grounds that (1) the court has no jurisdiction of the person of the defendant, (2) the court has no jurisdiction of the subject-matter of the action, and (3) the complaint does not state facts sufficient to constitute a cause of action, it was held that the defendant, by demurring to the merits of the petition, waived the objection that the court had no jurisdiction over its person, and submitted itself to the jurisdiction of the court, and a personal judgment was properly rendered against it.²³

§ 1037. Plea denying jurisdiction of subject matter presented in general answer.—In the circuit courts of the United States, in all actions at law, as well as suits in equity, the plaintiff must, in his declaration or complaint, allege all the jurisdictional facts which are necessary to sustain the jurisdiction of the court, and a defect of jurisdiction over the subject-matter cannot be waived, and may be interposed at any time before final judgment; and the defendant may, therefore, in conformity to the state procedure, embrace in his general answer, together with defenses in abatement and in bar, a denial, either general or specific, according to the requirements of the state rules of pleading, of the jurisdictional averments contained in

²² *Fitzgerald & Mallory Construction Co. v. Fitzgerald*, 137 U. S. 98-113 (34:608).

²³ *St. Louis & San Francisco Ry. Co. v. McBride*, 141 U. S. 127-132 (35:659).

the declaration or complaint, and in this manner put in issue the jurisdiction of the court over the subject-matter of the action, and put the plaintiff upon proof of his jurisdictional averments; and, when the jurisdiction over the subject-matter is so put in issue, if, upon writ of error to the supreme court, the record shows no proof or finding of the facts alleged by the plaintiff to support the jurisdiction of the circuit court, the case will be reversed for want of jurisdiction, and remanded with discretion in the lower court to either dismiss the action for want of jurisdiction, or set aside the verdict and permit the plaintiff to offer evidence to prove the jurisdictional averments.²⁴

In the state of Nebraska, whose Code of Civil Procedure permits the defendant to controvert any material allegation by a general or specific denial, an action was brought in the United States circuit court, the jurisdiction being based upon diversity of the citizenship of the parties, which was properly alleged in the petition. The defendant, in his answer, pleaded (1) specially the statute of limitations, and (2) "defendant, further answering, denies each and every allegation in said petition contained." It was held that this general denial put in issue the allegations of plaintiff's petition in regard to the citizenship of the parties, and there being in the record no proof or finding upon this issue the case was reversed for want of jurisdiction in the circuit court.²⁵

§ 1038. Equitable defenses cannot be pleaded to actions at law.—In suits at common law, in the circuit courts of the United States, the defendant can plead legal defenses only, and he is not permitted to set up equitable defenses in bar of the action, although a different rule of pleading and procedure is established by the statutes of the state where the circuit courts are held. This rule seems to be inflexible, and the act of conformity must yield in all cases of a conflict.²⁶

²⁴ *Roberts v. Lewis*, 144 U. S. 653-658 (36:579).

²⁵ *Roberts v. Lewis*, *supra*.

²⁶ *Robinson v. Campbell*, 3 Wheat. 207-224 (4:372); *Bagnell v. Broderick*, 13 Pet. 436 (10:235); *Watkins v. Holman*, 16 Pet. 25-64 (10:873); *Greer v. Mezes*, 24 How. 268-278 (16:661); *Foster*

v. Mora, 98 U. S. 425-428 (25:191); *Singleton v. Touchard*, 1 Black, 342-345 (17:50); *Jones v. McMasters*, 2 How. 8-22 (15:805); *Scott v. Armstrong*, 146 U. S. 499-513 (36:1059); *Burnes v. Scott*, 117 U. S. 582-591 (29:991); *Hickey v. Stewart*, 3 How. 750-763 (11:814); *ante* secs. 978, 979, 980.

§ 1039. **Resume.**—The previous discussion in this chapter has, it is submitted, established the following propositions, namely:

1. The defenses to actions at law in the circuit courts of the United States are all embraced in three general classes, viz.: (1) defenses to the jurisdiction of the court over, first, the person of the defendant, and, second, the subject-matter of the action; (2) defenses in abatement of the action; and (3) defenses in bar of the action.

2. These three defenses exist and may be availed of in two forms, viz: (1) by demurrer, presenting an issue of law; and (2) by plea of fact, either denying the averments of plaintiff's declaration, or alleging new facts, or both, presenting an issue, or issues of fact.

3. The defenses in bar of the action by plea of fact are embraced in three general classes, viz: (1) pleas by way of traverse or denial, either general or special; (2) pleas by way of confession and avoidance; and (3) pleas of estoppel.

4. The defendant in an action at law in a circuit court of the United States must, in presenting his defenses to the action, conform to the order, forms and modes of pleading and procedure of the state where the circuit court is held; except that, in all cases, the objection that the court has no jurisdiction over the person of the defendant must be presented separately, under a special appearance, in the first instance, and decided before any defense is made to the merits, or the point will be waived.

5. Equitable defenses cannot be interposed to actions at law, in the circuit courts of the United States, any rule of state procedure to the contrary notwithstanding.

§ 1040. **Cross-demands in actions at law available in federal circuit court.**—The remedies by set-off, counterclaim, recoupment, cross-action, and plea in reconvention, allowed by the codes of procedure are, within the meaning of the act of conformity, "practice, pleadings, and forms and modes of proceedings," and, under certain restrictions, are available to parties in actions at law in the circuit courts of the United States.²⁷

²⁷ U. S. Rev. Stat. sec. 914; 4 (21:229); *Dushane v. Benedict*, Fed. Stat. Anno. 563; *Partridge v. 120 U. S. 630-648 (30:810)*; *Pacific Express Co. v. Malin & Col-Phoenix Ins. Co.*, 15 Wall. 573-580

§ 1041. **Equitable cross-demands cannot be pleaded in an action at law.**—As has been shown by an abundant citation of authorities in previous parts of this work, the jurisprudence of the United States has always recognized the distinction between law and equity as, under the constitution, matter of substance as well as form and procedure, and, accordingly, legal and equitable claims cannot be blended together in one suit in the circuit courts of the United States, nor equitable defenses permitted to actions at law; and, upon this principle, an equitable demand cannot be set up by way of set-off, counterclaim, cross-action, or plea in reconvention in an action at law in those courts, although it be allowed by the state procedure.²⁸

vin, 132 U. S. 531-538 (33:450); ²⁸ Scott v. Armstrong, 146 U. S. Charnley v. Sibley, 73 Fed. R. 982. 499-513 (36:1059).

CHAPTER XXVII.

INTERVENTIONS IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

§ 1042. The remedy by intervention unknown at common law.

1043. The remedy by intervention available in ac-

tions at law in the federal circuit courts.

§ 1044. Intervention cannot be used to blend legal and equitable remedies.

§ 1042. The remedy by intervention unknown at common law.—The remedy by intervention, by which a third person, not originally a party, is permitted to become a party to an action or proceeding, between other persons, either by joining the plaintiff in claiming what is sought by the complaint, or by uniting with the defendant in resisting the claims of the plaintiff, or by demanding something adversely to both the plaintiff and defendant, was wholly unknown to the common law system of remedies and pleading. The state of Louisiana was the first to establish statutory intervention in this country, and her statutes have been made the basis of similar enactments in other states of the Union. In Texas, the remedy by intervention, as it was established in Louisiana, was adopted by the courts, and later regulated by statute. In those states which have adopted the remedy, and which have likewise blended legal and equitable remedies, interventions are allowed, indiscriminately, in both legal and equitable actions; and third persons are allowed to intervene and assert equitable titles in legal actions and to assert legal titles in equitable actions. In those states, the blending and confusion of legal and equitable remedies characterize and encumber the remedy by intervention, in like manner as they do the other features of the legal remedies and procedure established by the state.¹

¹ Code of Proc. of Louisiana (36:521); *Gasquet v. Johnson*, 1 (1825, reprint 1853) arts. 389-403; *La. 431*; *Brown v. Saul*, 4 *Martin*, *Smith v. Gale*, 144 U. S. 509-527 N. S. (La.) 434; S. C. 16 Am. Dec.

§ 1043. **The remedy by intervention available in actions at law in the federal circuit courts.**—The remedy by intervention, as established by state statutes, embraces pleading, process, service, issues of law and fact, interlocutory orders, trial, final judgment, and execution, and, therefore, constitutes “practice, pleadings, forms and modes of proceeding,”² within the meaning of the act of conformity, and is available in actions at law in the circuit courts of the United States, sitting in the states whose procedure allows such remedy, in so far as it is not inconsistent with the system of legal remedies administered in those courts.³

§ 1044. **Intervention cannot be used to blend legal and equitable remedies.**—Inasmuch as it is a fundamental rule, of universal application, that legal and equitable remedies must be separately pursued,⁴ and legal and equitable claims cannot be blended together in one suit,⁵ in the circuit courts of the United States, it inevitably follows that a person or party cannot intervene in an action at law in those courts for the purpose of asserting an equitable claim or title. Nor can an equitable defense be set up against a petition of intervention which sets up a legal claim or title. The pleadings in intervention constitute a suit, though dependent upon the original action;⁶ and it must be prosecuted⁷ and defended⁸ upon legal titles, in the same manner as any other suit upon the law docket of the federal circuit courts.

175 and note 177–184; *Horn v. Volcano Water Co.*, 13 Cal. 62; *Hocker v. Kelley*, 14 Cal. 164; *Coffey v. Greenfield*, 62 Cal. 602; *Lewis v. Harwood*, 28 Minn. 428; *Legg v. McNeill*, 2 Texas, 430; *Bank v. Weems*, 69 Texas, 489, 6 S. W. R. 802–808; *Braithwaite v. Aiken* (North Dakota) 56 N. W. R. 133–139; *Mercantile Trust Co. v. Atlantic & P. R. Co.*, 63 Fed. R. 513; *Union Trust Co. v. Atchison, Topeka & Santa Fe Ry. Co.*, 43 Pac. R. 704; Texas Rev. Stat. art. 1184; Dakota Code of Civil Prac. secs. 89, 90.

² Ante, sec. 1042, and authorities there cited.

³ U. S. Rev. Stat. sec. 914; 4 Fed. Stat. Anno. 563

⁴ *Scott v. Neely*, 140 U. S. 106–117 (35:358); *Cates v. Allen*, 149 U. S. 451–465 (37:804).

⁵ *Scott v. Armstrong*, 146 U. S. 499–513 (36:1059).

⁶ Ante sec. 1042 and authorities there cited.

⁷ *Fenn v. Holme*, 21 How. 481–488 (16:198).

⁸ *Robinson v. Campbell*, 3 Wheat. 207–224 (4:372).

CHAPTER XXVIII.

AMENDMENTS OF PLEADINGS AND PROCESS IN SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1045. Court's power of amendment controlled by federal statute.</p> <p>1046. Extent of the power to allow amendments.</p> | <p>§ 1047. Amendment of process.</p> <p>1048. Allowance of amendments discretionary.</p> <p>1049. Amendment after reversal by the supreme court.</p> |
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§ 1045. Court's power of amendment controlled by federal statute.—Notwithstanding the act of conformity, in actions at law in the circuit courts of the United States, the court's power to allow amendments of the process and pleadings is, in every case of conflict between state and federal statutes, controlled by the latter. It is a rule of universal application, that when congress has legislated upon any matter of practice, pleading, or procedure, and prescribed a definite rule upon any such matter for the government of its own courts, it is, to that extent, exclusive of the legislation of the state upon the same matter. This rule applies to the power of the court to permit the parties to make amendments.¹

§ 1046. Extent of the power to allow amendments.—The power vested, by the federal statute, in the circuit courts, to allow amendments, in actions at law, as well as in suits in equity, is of the most sweeping character. Such court "may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."² This power of the court to permit amendments extends to "any defect," and continues as long as the court retains control of the record, and until the cause has passed from its jurisdiction. After verdict, in an action at law, the power exists to allow the plaintiff to

¹ Mexican Central Ry. Co. v. Du-
thie, 189 U. S. 76-78 (47:715).

² U. S. Rev. Stat. sec. 954; 4
Fed. Stat. Anno. 596.

amend his declaration or complaint by alleging the facts necessary to give the court jurisdiction of the cause, where such allegation had been omitted, or had been defectively made.³

§ 1047. **Amendment of process.**—“Any circuit or district court may at any time, in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable before it, where the defect has not prejudiced, and the amendment will not injure the party against whom such process issues.”⁴

And “no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; * * * and such court shall amend every such defect and want of form,” other than those which the party demurring so expresses; “and may at any time permit either of the parties to amend any defect in the process.”⁵

Under these statutory provisions, the broadest liberality has been exercised in allowing amendments.⁶ It has been held that a petition and bond for the removal of a cause from a state court into a circuit court of the United States are in the nature of process, and, indeed, constitute the process by which the case is transferred; and that such a petition may be amended, after the removal papers have been filed in the federal court, so as to show the jurisdictional facts.⁷

§ 1048. **Allowance of amendments discretionary.**—In actions at law, in the circuit courts of the United States, the granting or refusing of leave to file additional pleadings, or to amend

³ Mexican Central Ry. Co. v. Dutlie, 189 U. S. 76-78 (47:715).

⁴ U. S. Rev. Stat. sec. 948; 4 Fed. Stat. Anno. 593.

⁵ U. S. Rev. Stat. sec. 954; 4 Fed. Stat. Anno. 596.

⁶ Erstein v. Rothschild, 22 Fed. R. 61; Norton v. Dover, 14 Fed. R. 106; Hampton v. Rouse, 15 Wall. 684-686 (21:250); Semmes v. United States, 91 U. S. 21-27 (23:193). Chamberlain v. Bittersohn, 48 Fed. R. 42; Gilbert v. Exposition Co., 113 Fed. R. 523; Da-

vis v. Kansas City R. Co., 32 Fed. R. 863; Gulf R. Co. v. James, 48 Fed. R. 148; Booth v. Denik, 65 Fed. R. 43; Woolridge v. McKenna, 8 Fed. R. 650; Harris v. Delaware R., 18 Fed. R. 833; Deford v. Mehaffy, 13 Fed. R. 481; Wolf v. Cook, 40 Fed. R. 432; Daniel v. United States Shoe Machinery Co., 120 Fed. R. 823.

⁷ Kinney v. Columbia Savings & Loan Association, 191 U. S. 78-84 (48:103).

those already filed, or to withdraw pleadings on file and to file others of a similar or different character, is discretionary with the trial court, and not reviewable by the appellate court, except in cases of gross abuse of discretion.⁸

§ 1049. Amendment after reversal by the supreme court.—

When, upon writ of error, the supreme court reverses a case upon the ground that the record does not affirmatively show that the circuit court had jurisdiction of the cause, there being a failure on the part of the plaintiff to allege the jurisdictional facts, it will not direct a dismissal of the action, but will remand it, with direction to the trial court to grant leave to the plaintiff to amend his declaration or complaint, by alleging the facts showing jurisdiction in the circuit court at the time of the commencement of the suit.⁹

⁸ *Gormley v. Bunyan*, 138 U. S. 623-635 (34:1086); *Chapman v. Barney*, 129 U. S. 677-682 (32:800); *Mandeville v. Wilson*, 5 Cranch. 15-19 (3:23); *Mexican Central Ry. Co. v. Duthie*, 189 U. S. 76-78 (47:715); *Mexican Central Ry. Co. v. Pinkney*, 149 U. S. 194-210 (37:699); *Eberly v. Moore*, 24 How. 147-158 (16:612).

⁹ *Robertson v. Cease*, 97 U. S. 646-654 (24:1057); *Morgan v. Gay*, 19 Wall. 81 (22:100).

CHAPTER XXIX.

TRIAL OF SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1050. Two modes for the trial of issues of fact.</p> <p>1051. Same—All material issues of fact.</p> <p>1052. State law authorizing trial by referee not followed in federal courts.</p> <p>1053. Mode of trying the issue of jurisdiction.</p> <p style="text-align: center;">(a) TRIAL BY JURY.</p> <p>1054. Must be a trial by a common law jury and a common law jury trial.</p> <p>1055. Qualifications of jurors.</p> <p>1056. Same—Certain persons disqualified to serve in suits arising under the "Civil Rights" act.</p> <p>1057. Jurors apportioned to district by direction of the court.</p> <p>1058. How jurors are drawn.</p> <p>1059. Mileage and per diem of jurors.</p> <p>1060. Writs of Venire Facias—How issued and served.</p> <p>1061. Talesmen for petit jurors.</p> <p>1062. Same—Provisions of revised statutes as to talesmen not repealed.</p> <p>1063. Special jurors.</p> <p>1064. Each party entitled to three peremptory challenges in civil cases.</p> <p>1065. Same—Challenges are of two kinds.</p> <p>1065a. Challenges should be specific.</p> | <p>§ 1066. Impaneling the jury—mode of procedure.</p> <p>1067. Stating the issues of fact to the court and jury.</p> <p>1068. State rules of evidence control in federal courts.</p> <p>1069. Competency of witnesses—State law controls.</p> <p>1070. Subpoenas for witnesses—One hundred mile limit.</p> <p>1071. Witnesses must testify orally in open court—Exceptions—Controlled exclusively by federal statutes.</p> <p>1072. Same—Depositions de bene esse cannot be read if presence of witness can be procured.</p> <p>1073. Mode of taking depositions de bene esse—Either federal or state statutes may be followed.</p> <p>1074. Motions to suppress depositions—Should be opportunely made.</p> <p>1075. Surgical examination of plaintiff in personal injury suits without his consent.</p> <p>1076. Same—Surgical examination does not contravene rule requiring oral testimony in open court.</p> <p>1077. Cross-examination of witnesses confined to matters of direct examination—Exceptions to the rule.</p> |
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- § 1078. Documentary Evidence—
Legislation of congress.
1079. Statutory power of federal courts to compel production of books and writings in evidence in trials at law.
1080. Same—The requisite procedure to obtain the order for production.
1081. Same—Shall the production be at or before trial?
1082. Same—Limitations upon the power to compel production.
1083. Same—Same — Immunity statutes.
1084. Subpoena *duces tecum*—
Power of federal courts to issue.
1085. Same — Same — To obtain original papers in the general land office.
1086. Introduction of Evidence—
Order of proof.
1087. Objections to the admission of evidence—Must be specific.
1088. Same—Objections not specified are waived.
1089. Same—When the objection should be made.
1090. Demurrer to the evidence.
1091. Province of court and jury, respectively, in trials at common law.
1092. The court not controlled by state constitutions and laws as to the manner of instructing juries.
1093. Duty of the court to submit all issues of fact to the jury.
1094. Duty of the court to charge the law of the whole case.
1095. Requested instructions —
Sound and erroneous propositions asked in the aggregate.
- § 1096. Court not required to submit special issues to the jury.
1097. Peremptory instructions.
1098. Same—Existence of negligence or contributory negligence a question for the jury.
1099. Same—Motion for peremptory instruction should not be made till evidence closes.
1100. Duty of federal courts to give in charge the law of the state to the jury.
1101. Same—Must maintain the supremacy of the federal constitution.
1102. Withdrawal of the jury from the bar to deliberate upon their verdict.
1103. The verdict of the jury—
Either general or special.
1104. Same—Special verdict, defined and practice on it stated.
1105. Same—Same — Distinction between a special verdict at common law, and special issues under state statutes.
1106. Same—A “special case” defined.
1107. Same — Same — “Special Case” and “Agreed Case” recognized as proper procedure in the federal courts.
1108. The verdict must find all the material issues of fact.
1109. Same — The federal rule accords with the common law rule.
1110. The legal effect of verdicts determined by state law.
1111. Writs of inquiry.
1112. Amending the verdict.
1113. Same—“Manifest intent of the jury.”

§ 1114. Defects cured by verdict—
Common law rule.

1115. Motion in arrest of judgment.

1116. Motions for judgment *non obstante veredicto*, and repleader—Distinction.

1117. New trials—Authority of the federal courts to grant.

1118. Same—Not controlled by rules of state procedure.

1119. Same—Same—When state law gives new trial in ejectment.

1120. Same—It is a matter of right to make a motion for a new trial.

1121. Same—Granting or refusing rests in discretion of the trial court.

1122. Same—When the motion for new trial must be filed.

1123. Same—Reasons for granting new trial.

1124. The judgment—Controlled by state laws.

1125. Same—Lien of judgments of the United States courts.

1126. Same — Federal court

clerks to keep index of judgments.

§ 1127. Execution—State remedies in force on December 1, A. D. 1873—State remedies subsequently adopted by federal courts.

1128. Same—Executions to run in all districts of a state.

(b) TRIAL BY THE COURT WITHOUT THE INTERVENTION OF A JURY.

1129. Procedure in trials by the court.

1130. Same—Analysis of the procedure.

1131. The stipulation waiving a jury.

1132. What questions of law may be raised on the trial and reviewed on writ of error.

1133. Same—*Obiter dictum* of Mr. Justice Bradley.

1134. The practice and procedure stated by Mr. Justice Miller.

1135. Requisites of a special finding by the court.

1136. The special finding should be "spread at large upon the record."

1137. Nonsuit upon the trial.

§ 1050. Two modes for the trial of issues of fact.—There are two modes established by law, for "the trial of issues of fact," in suits at common law, in the circuit courts of the United States, namely: (1) by a jury;¹ and (2) "by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury," and, when a jury is so waived, "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury."²

¹ U. S. Rev. Stat. sec. 648; 4 Fed. Stat. Anno. 389; U. S. Comp. Stat. 1901, p. 525; 1 U. S. Stat. at L. ch. 20, sec. 12, p. 79; 13 U. S. Stat. at L. ch. 86, sec. 4, p. 501; Swift & Co.

v. Jones, 145 Fed. R. 489; Hodges v. Easton, 106 U. S. 408-413 (27: 169).

² U. S. Rev. Stat. sec. 649; 4 Fed. Stat. Anno. 393; U. S. Comp. Stat.

§ 1051. **Same—All material issues of fact.**—The words, “the trial of issues of fact,” contained in the statute,³ mean the trial “of all the material issues of fact” in the case; and where a jury is not waived, a verdict which does not contain findings upon all the issues in the case is insufficient to authorize the court to render a judgment. The court cannot, consistently with the constitutional right of trial by jury, submit a part of the facts to the jury, and itself determine the remainder, without a waiver by the parties of a verdict by the jury. Trial by jury is a fundamental guaranty of the rights and liberties of the people, and, consequently, every reasonable presumption should be indulged against its waiver. The opinion of the court cannot aid the imperfect findings of fact made by the jury, upon special issues submitted to them.⁴

§ 1052. **State law authorizing trial by referee not followed in federal courts.**—The legislation of congress having, in terms, directed that trials in actions at law in the federal courts, so far as the ascertainment and determination of all the material issues of fact are concerned, shall be by jury trial, or by the court without the intervention of a jury, pursuant to and in the manner prescribed by statute, waiving a jury, and requiring that upon such trials the proof shall be by the examination of the witnesses in open court, (with certain specified exceptions), and prescribed the manner in which the rulings of the court in the progress of such trial may be reviewed upon writ of error, such courts are not authorized to follow a state statute by which actions at law are, after issue joined, referred to a referee, auditor, or master, with authority, under the local statute, to hear the same, and pass upon the issues of fact arising out of the pleadings, and report his findings of fact to the court. The legislation of congress having prescribed definite rules upon the

1901, p. 525; 13 U. S. Stat. at L. ch. 86, sec. 4, p. 501; U. S. Rev. Stat. sec. 700; 4 Fed. Stat. Anno. 450; U. S. Comp. Stat. 1901, p. 570; *Swift & Co. v. Jones*, 145 U. S. 489; *Hodges v. Easton*, 106 U. S. 408–413 (27:169).

³ U. S. Rev. Stat. sec. 648; 4 Fed. Stat. Anno. 389; U. S. Comp. Stat. 1901, p. 525.

⁴ *Hodges v. Easton*, 106 U. S. 408–413 (27:169); *Prentice v. Zane*, 8 How. 470–489 (12:1160); *Chesapeake Ins. Co. v. Stark*, 6 Cranch. 268–273 (3:220); *Barnes v. Williams*, 11 Wheat. 415–417 (6:508); *Buchanan v. Delaware Ins. Co.*, 7 Cranch. 434–435 (3:396).

subject, for the government of its own courts, they are, to that extent, exclusive of state legislation upon the same subject; and all such state legislation, in so far as it prescribes rules for the ascertainment of the facts in such actions, inconsistent with the provision of the federal law, should be disregarded by the federal courts. It is the duty of the federal trial courts to rigidly adhere to the federal statutes prescribing the modes of trial; the presumptions are all unfavorable to the waiver of the right of trial by jury, and whenever cases are submitted to them for trial without a jury, it should appear that the waiver has been made in the manner prescribed by the federal statute. Trial by referee is, at least in the federal courts, a delusion and a snare, and in plain violation of the federal constitution and laws.⁵

§ 1053. **Mode of trying the issue of jurisdiction.**—There is no federal statute prescribing any mode for the trial of issues of fact affecting the jurisdiction of the court. The judiciary act does not prescribe any particular mode in which the issue of jurisdiction is to be raised and presented to the court, nor, when raised, how such issue shall be determined. It is now, however, settled by the decisions of the supreme court that, in actions at law, in the federal circuit courts, when the jurisdiction of the court is in issue, the court may, in its discretion, direct the issue to be tried by the jury, or it may, without a waiver by the parties, try the issue itself, without the intervention of a jury. The trial, whether by the jury or the court, should take such form that the decision may be reviewed upon the facts as well as the law upon writ of error, and as will enable the appellate court to determine whether the conclusion of the trial court is warranted by the evidence.⁶

(a) TRIAL BY JURY.

§ 1054. **Must be a common law jury and a common law jury trial.**—The trial by jury secured by the constitution and laws of the United States, to parties to suits at common law, in the federal courts, means (1) a trial by a common law jury,

⁵ *Swift & Co. v. Jones*, 145 Fed. 115-128 (42:682); *Globe Refining Co. v. Landa Cotton Oil Co.*, 190 U. S. 540-547 (47:1171).
⁶ *Booger v. New York Life Ins. Co.*, 103 U. S. 90-98 (26:310).

⁶ *Wetmore v. Rymer*, 169 U. S.

and (2) a trial conducted according to the settled rules of the common law. A common law jury is a jury composed of twelve men, neither more nor less, who are upright, well qualified and lawful men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within the jurisdictional limits of the court, drawn and selected by officers free from all bias in favor of or against either party, duly impaneled under the direction of a competent court, sworn to render a true verdict according to the law and the evidence given them; who, after hearing the parties and their evidence, and receiving the instructions of the court relative to the law involved in the trial, and deliberating, when necessary, apart from all extraneous influences, must return their unanimous verdict upon the issues submitted to them. Trial by jury in civil suits at common law in the courts of the United States, is a trial by a jury of twelve men, in the presence of, and presided over by, and under the superintendence of a judge, by the oral testimony of witnesses delivered in the presence of the judge and jury, with power and authority in the judge to rule upon objections to evidence, and to instruct the jury upon the law, and, also, when in his judgment the due administration of the law requires it, to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion on questions of fact, provided only he submits those questions to their determination, and with the further power in the judge to set aside their verdict if, in his opinion, it is against the law and evidence, and to grant a new trial.⁷ The federal statutes have made some exceptions to the requirement that the trial shall be by oral testimony, which have been discussed in a previous section,⁸ and will be again adverted to in a subsequent part of this chapter.

§ 1055. **Qualifications of jurors.**—Jurors to serve in the courts of the United States, in each state respectively, shall have the same qualifications, and be entitled to the same exemptions, as

⁷ *Capital Traction Company v. Hof*, 174 U. S. 1-46 (43:873); *Vicksburg & Meridian R. Co. v. Putnam*, 118 U. S. 545-557 (30:257); *Carver v. Jackson*, 4 Pet. 1-101 (7:261); *Maginac v. Thompson*, 7 Pet. 348-399 (8:709); *Mitchell v. Harmony*, 13 How. 115-150 (14:75); *Transportation Line v. Hope*, 95 U. S. 297-303 (24:477); *United States v. Philadelphia & Reading R. Co.*, 123 U. S. 113-117 (31:138); *United States v. 1363 Merchandise*, 2 Sprague, 85-88.

⁸ Ante, sec. 937.

jurors of the highest courts of law in such state may have and be entitled to at the time when such jurors for service in courts of the United States are summoned. But no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States on account of race, color or previous condition of servitude.⁹

§ 1056. Same—Certain persons disqualified to serve in suits arising under the “Civil Rights” Act.—By the fifth section of the act of April 20, 1870, entitled “an act to enforce the provisions of the Fourteenth amendment to the constitution of the United States, and for other purposes,” it is provided that:

“No person shall be a grand or petit juror in any court of the United States, upon any inquiry, hearing, or trial of any suit, proceeding, or prosecution, based upon or arising under the provisions of Title ‘Civil Rights,’ and of Title ‘Crimes,’ for enforcing the provisions of the Fourteenth amendment to the constitution of the United States, who is, in the judgment of the court, in complicity with any combination or conspiracy in said Titles set forth; and every grand and petit juror shall, before entering upon any such inquiry, hearing, or trial, take and subscribe an oath, in open court, that he has never, directly or indirectly, counseled, advised, or voluntarily aided any such combination or conspiracy.”¹⁰

§ 1057. Jurors apportioned to district by direction of the court.—“Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burden the citizens of any part of the district with such services.”¹¹

§ 1058. How jurors are drawn.—In the courts of the United states, all jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of such drawing, the names of not

⁹ U. S. Rev. Stat. sec. 800; 21 U. S. Stat. at L. ch. 52, sec. 2, p. 43; 4 Fed. Stat. Anno. 373, 749, 750; U. S. Comp. Stat. 623, 624; 18 U. S. Stat. at L. ch. 114, sec. 4, p. 339; 4 Fed. Stat. Anno. 740–741.

U. S. Stat. at L. ch. 22, sec. 5, p. 15; 4 Fed. Stat. Anno. 748–749; U. S. Comp. Stat. 1901, p. 630.

¹¹ U. S. Rev. Stat. sec. 802; 1 U. S. Stat. at L. ch. 20, sec. 29, p. 88; 4 Fed. Stat. Anno. 741; U. S. Comp. Stat. 1901, p. 625.

¹⁰ U. S. Rev. Stat. sec. 822; 17

less than three hundred persons, possessing the qualifications prescribed in section eight hundred of the Revised Statutes, which names shall have been placed therein by the clerk of the court and a commissioner, to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which the court is held, and a well known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in the box alternately, without reference to party affiliations, until the whole number required be placed therein. But the judge of the court may order the names of jurors to be drawn from the boxes used by the state authorities in selecting jurors in the highest courts of the state. No person shall serve as a petit juror more than one term in any one year.¹²

§ 1059. Mileage and per diem of jurors.—The *per diem* pay of each juror, grand and petit, in any court of the United States, for actual attendance, and for the time necessarily occupied in going to and returning from court, shall be three dollars a day; and for the distance necessarily traveled from his residence in going to and returning from court by the shortest practicable route, he shall receive five cents a mile.¹³

§ 1060. Writs of venire facias—How issued and served.—“Writs of *venire facias*, when directed by the court, shall issue from the clerk’s office, and shall be served and returned by the marshal in person, or by his deputy; or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as may be specially appointed for that purpose by the court, who shall administer to him an oath that he will truly and impartially serve and return the writ.”¹⁴

§ 1061. Talesmen for petit jurors.—“When, from challenges or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such defect of jurors happens, return

¹² 21 U. S. Stat. at L. ch. 52, sec. 2, p. 43; 4 Fed. Stat. Anno. 749–750; U. S. Comp. Stat. 1901, p. 624.

¹³ U. S. Rev. Stat. 852; 32 U. S. Stat. at L. ch. 1138, p. 396; 4 Fed. Stat. Anno. 749, 751.

¹⁴ U. S. Rev. Stat. sec. 803; 4 Fed. Stat. Anno. 742; U. S. Comp. Stat. 1901, p. 625; 1 U. S. Stat. at L. ch. 20, sec. 29, p. 88.

jurymen from the by-standers sufficient to complete the panel; and when the marshal or his deputy is disqualified as aforesaid, jurors may be so returned by such disinterested person as the court may appoint, and such person shall be sworn, as provided in the preceding section.”¹⁵

§ 1062. Same—Provisions of Revised Statutes as to talesmen not repealed.—Section eight hundred and four of the United States Revised statutes, directing how talesmen should be returned to complete the panel, in case of a deficiency, was not repealed by the act of congress of June 30, 1879; nor did that act touch the power of the court whenever, at the time of forming a jury to try a particular case, the panel of jurors previously summoned according to law is found for any reason to have been exhausted, to call in talesmen from the bystanders to supply the deficiency.¹⁶

§ 1063. Special juries.—“When special juries are ordered in any circuit court, they shall be returned by the marshal in the same manner and form as is required in such cases by the laws of the several states.”¹⁷

§ 1064. Each party entitled to three peremptory challenges in civil cases.—In all suits of a civil nature at common law, in the circuit courts of the United States, each party is entitled to challenge peremptorily three jurors, and, in all cases where there are several defendants or several plaintiffs, the parties on each side shall be deemed a single party for the purposes of all such challenges;¹⁸ but defendants in different actions cannot be deprived of their several challenges, by the order of the court, made under authority of the statute, for the prompt and convenient administration of justice, directing that two or more causes be consolidated and tried together.¹⁹ All challenges,

¹⁵ U. S. Rev. Stat. sec. 804; 1 U. S. Stat. at L. ch. 20, sec. 29, p. 88; 4 Fed. Stat. Anno. 742; U. S. Comp. Stat. 1901, p. 625; *St. Clair v. United States*, 154 U. S. 134-155 (38:936); *United States v. Munford*, 16 Fed. R. 164; *United States v. Rose*, 6 Fed. R. 136.

¹⁶ *St. Clair v. United States*, 154 U. S. 134-155 (38:936); *Lovejoy v. United States*, 128 U. S. 171-173 (32:389).

¹⁷ U. S. Rev. Stat. sec. 805; 2 U.

S. Stat. at L. ch. 31, sec. 30, p. 169; 4 Fed. Stat. Anno. 743; U. S. Comp. Stat. 1901, p. 626.

¹⁸ U. S. Rev. Stat. sec. 819; 17 U. S. Stat. at L. ch. 333, sec. 2, p. 282; 4 Fed. Stat. Anno. 745; U. S. Comp. Stat. 1901, p. 629.

¹⁹ *Mutual Life Ins. Co. v. Hillman*, 145 U. S. 285-300 (36:707); *Connecticut Mut. Life Ins. Co. v. Hillman*, 188 U. S. 208-220 (47:446).

whether to the array or panel, or to individual jurors for cause or favor, shall be tried by the court without the aid of triers.²⁰

§ 1065. **Same—Challenges are of two kinds.**—Challenges for cause are of two kinds or classes, namely: (1) challenges to the array or panel, which are exceptions to the whole panel for some illegality or irregularity in drawing or summoning the jury, or partiality in arraying the panel; and (2) to the polls or individual jurors for “principal cause, or for favor.”²¹ This classification of challenges is clearly recognized by federal statute, and provision is made for the trial and determination of both classes.²² If there be any legal objection to the manner in which the petit jury has been drawn and summoned, and the panel arrayed, that objection should be presented *in limine*, by challenge to the array, or, as it is sometimes called, by motion to quash the panel.²³

§ 1065a. **Challenge should be specific.**—The right of challenge comes from the common law with the trial by jury itself, and has always been held essential to the fairness of a jury trial, in both criminal and civil causes.²⁴ But in order for the right to be availed of, it must be claimed at the proper time,²⁵ and in the proper manner. The proper mode of challenging a juror is for the party objecting, to specify distinctly the cause of the challenge, so that an issue of law or fact may be joined, and that it may be known whether it is for principal cause, or favor, and that the mode of trial may be determined; and if this be not done, the challenge is incomplete, and may be disregarded by the court, who is not bound to allow any examination into the competency, fairness and impartiality of a juror, unless he is properly challenged.²⁶

²⁰ U. S. Rev. sec. 819, *supra*.

²¹ Tidd's Prac. (1807) 779; Woodside's Case, 2 How. (Miss.) 655; Powers v. Pressgroves, 9 George (Miss.) 227; 3 Blk. Comm. 358, 359.

²² U. S. Rev. Stat. sec. 819; 4 Fed. Stat. Anno. 745.

²³ 1 Tidd's Prac. (1807) 779; United States v. Gale, 109 U. S. 65-74 (27:857); Fowler v. Lindsey, 3 Dall. 411 (1:658).

²⁴ 3 Bl. Com. 358-366; 4 Bl. Com. 352-355; United States v. Marchant, 12 Wheat. 480-486 (6:700); Lewis v. United States, 146 U. S. 370-387 (36:1011).

²⁵ The Mima Queen v. Hepburn, 7 Cranch. 290 (3:348); Kohl v. Lehlblack, 160 U. S. 293-303 (40:432).

²⁶ Powers v. Pressgroves, 9 George (Miss.) 227; Reynolds v. United States, 98 U. S. 145-168 (25:244).

§ 1066. **Impaneling the jury—Mode of procedure.**—There is no statute of the United States prescribing the method of procedure in impaneling juries in either criminal or civil causes. A federal statute does, however, declare that the courts of the United States “may, by rule or order, conform the designation and impaneling of jurors, in substance, to the laws and usages relating to jurors in the state courts, from time to time in force in such state.”²⁷ This was not an adoption of the state procedure. Congress has not made the laws and usages relating to the designation and impaneling of jurors in the respective state courts applicable to the courts of the United States, except as the latter shall by general standing rule or by special order in a particular case adopt the state practice in that regard; and, in the absence of such a rule or order, the mode of procedure in the designation and impaneling of jurors for the trial of cases in the courts of the United States is within the control of those courts, subject only to the restrictions congress has prescribed, and, also, to such limitations as are recognized by the settled principles of law to be essential in securing impartial juries for the trial of causes.²⁸

§ 1067. **Stating the issues of fact to the court and jury.**—A jury trial is an examination of the matters of fact in issue between the parties. The main object of pleadings in actions at law is to ascertain, define, and place upon the record the issue or issues of fact involved in the case, so that they may be under the direction of the court submitted to and determined by the jury. It is absolutely essential to a fair, impartial, simple, orderly and intelligent trial, that, before any evidence is adduced, the issues of fact in the case shall be clearly and distinctly stated to the jury; and, accordingly, the jury having been impaneled and sworn, the very first step in the trial is to state the issues of fact presented by the pleadings, and the facts which the parties propose to prove, respectively, in support of those issues. The jury are to try the issues and give a verdict according to the evidence; the court is to rule upon the admissibility of the

²⁷ U. S. Rev. Stat. sec. 800; 4 Fed. Stat. Anno. 737.

²⁸ United States v. Shackelford, 18 How. 588-591 (15:495); Pointer v. United States, 151 U. S. 396-

420 (38:208); St. Clair v. United States, 154 U. S. 134-155 (38:936); United States v. Richardson, 28 Fed. R. 61; Lewis v. United States, 146 U. S. 370-387 (36:1011).

evidence, and its relevancy to those issues, and to submit them in its final charge to the jury, with appropriate legal rules for their solution; and it is inconceivable that the trial could proceed at all until the issues are clearly defined and understood by both branches of the tribunal which, for the time, sits for the sole purpose of their determination. There should be no clandestine issue, lurking in the record, to be brought forward in argument after the evidence is closed, or made the basis of an exception after the court has delivered its charge to the jury, or upon motion for a new trial. The practice of stating the issues to the court and jury in the trial of civil actions at law, comes down to us from the common law with the trial by jury itself, and is an essential element of such trial. At one period in the history of such trial, "the whole record and process of the pleadings was read" to the jury "in English by the court, and the matters in issue clearly explained to their capacities;"^{28a} but, by the more modern practice, the issues are stated orally to the court and jury, by the respective counsel of the parties, and such statements of counsel, when deliberately made, are regarded as so essential an element in the trial, that, if they disclose the absence of a cause of action or ground of defense, the court will, without hearing any testimony, immediately direct a verdict.²⁹

§ 1068. **State rules of evidence control in federal courts.**— In the trial of all civil actions at common law, in the circuit and district courts of the United States, those courts are required, by the thirty-fourth section of the original judiciary act,³⁰ to observe and enforce, as rules of decisions, the rules of evidence prescribed by the laws of the several states in which such courts are, respectively, held, except where the constitution, treaties or statutes of the United States shall otherwise require or provide;³¹ and the "laws of the several states" embrace, within the meaning of the federal statutes, not only the

^{28a} 3 Bl. Com. 366, 367.

²⁹ *Oscanyon v. Winchester Repeating Arms Co.*, 103 U. S. 261-278 (26:539); *Butler v. National Home for Disabled Volunteer Soldiers*, 145 U. S. 64-75 (36:347).

³⁰ U. S. Rev. Stat. sec. 721; 1 U. S. Stat. at L. ch. 20, sec. 34, p.

92; 4 Fed. Stat. Anno. 517; U. S. Comp. Stat. 1901, p. 581.

³¹ *Vance v. Campbell*, 1 Black, 427-431 (17:168); *Wright v. Bales*, 2 Black, 535-538 (17:264); *McNiel v. Holbrook*, 12 Pet. 84-90 (9:1009); *Sims v. Hundley*, 6 How. 1-11 (12:319); *Ryan v. Bindley*,

statutes of the states, but the decisions of the highest courts of the several states announcing rules of evidence.³²

§ 1069. Competency of witnesses—State law controls.—In all civil actions at common law in the circuit and district courts of the United States the competency of witnesses is to be determined by the laws of the state in which the courts, respectively, are held. By a recent act of congress, section eight hundred and fifty-eight of the Revised Statutes of the United States is amended, so as to read as follows:

“Sec. 858. The competency of a witness to testify in any civil action, suit, or proceeding in the courts of the United States shall be determined by the laws of the state or territory in which the court is held.”³³

§ 1070. Subpoenas for witnesses—One hundred mile limit.—“Subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into any other district: Provided, that in civil causes the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same.”³⁴ In such cases, the distance from the place where the witness lives to the place where the court is held is to be determined by the ordinary, usual, and shortest route of public travel, and not by a mathematically straight line drawn between the two points.³⁵

§ 1071. Witnesses must testify orally in open court—Exceptions—Controlled exclusively by federal statutes.—Inasmuch as federal procedure in civil actions at law, in the circuit courts of the United States, is in some respects controlled by the laws of the states where those courts are, respectively, held, and in other respects by federal law, it is important, in a discussion

1 Wall. 66-68 (17:559); Connecticut Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250-261 (28:708); Bucher v. Cheshire R. Co., 125 U. S. 555-585 (31:795); Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221-232 (47:782).

³² Bucher v. Cheshire R. Co., 125 U. S. 555-585 (31:795); Nashua Savings Bank v. Anglo-American

Land, Mortgage & Agency Co., 189 U. S. 221-232 (47:782).

³³ 34 U. S. Stat. at L. 618; Fed. Stat. Anno. Supplmt. 1907, p. 382.

³⁴ U. S. Rev. Stat. sec. 876; 7 Fed. Stat. Anno. 1121; U. S. Comp. Stat. 1901, p. 667; 1 U. S. Stat. at L. ch. 22, sec. 6, p. 335.

³⁵ Jennings v. Menaugh, 118 Fed. R. 612; Ex parte Beebees, 2 Wall. Jr. 127, Fed. Cas. No. 1220.

of trial by jury, to keep in mind the clear distinction between the *rules of evidence* and the *mode of proof*; for, while in such trials the rules of evidence prescribed by the laws of the state are to be observed and enforced, except where the constitution, treaties or statutes shall otherwise require or provide,³⁶ the "mode of proof" is controlled, *exclusively*, by federal statutes.³⁷ By the fundamental principles and rules of the English common law, it was an essential element of trial by jury, in civil actions, that all the witnesses should appear at the trial, and, after being sworn at the bar, to depose to the truth and the *whole* truth, deliver their testimony orally, or in *parol*, in open court, publicly, and in the presence and hearing of the judge and jury, and of the parties and their attorneys and counsel, and all the bystanders; and this rule applied, not only to witnesses who were called to testify to the main facts in the case, but also to witnesses who were called to prove the execution of deeds, wills and other writings. And each party had the right to except to the competency of the evidence of any witness or any part of it, which exception was publicly stated in open court, and was by the judge openly and publicly allowed or disallowed; and if, in his ruling, the judge made a mistake as to the law, either by ignorance, inadvertence, or design, the party prejudiced by the error, might, by his counsel, require him publicly to seal a *bill of exceptions*, stating the point wherein he was supposed to err, which he was obliged to do, and if he refused the party might have a compulsory writ, commanding him to seal it, if the fact alleged be truly stated, and if he returned that the fact was untruly stated, when the case was otherwise, an action would lie against him by the aggrieved party for making a false return; and the error stated in the bill of exceptions was examinable in a superior court upon writ of error.³⁸ The value of this common law rule of proof was fully recognized by the founders of this government, many of whom were members of the first congress and aided in framing and passing the original judiciary act.³⁹

³⁶ Ante sec. 1068 and authorities there cited.

³⁷ Ante sec. 937 and authorities there cited.

³⁸ 3 Bl. Com. 366-374; Capital

Traction Co. v. Hof, 174 U. S. 1-46 (43:873).

³⁹ 1 U. S. Stat. at L. ch. 20, sec. 30, pp. 73-79.

It is provided by the legislation of congress, which is absolutely controlling upon the subject,⁴⁰ that "the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court," which means the production of the witness before the court at the time of trial, and his oral examination then and there, in the progress of the trial, in open court, publicly, in the presence and hearing of the judge and jury, and in the presence of the parties and their counsel: except that, *First*, the testimony of any witness may be taken in any civil cause depending in any district or circuit court of the United States, by deposition, *de bene esse*, (1) when the witness lives at a greater distance from the place of trial than one hundred miles, or (2) is bound on a voyage to sea, or (3) is about to go out of the United States, or (4) is about to go out of the district in which the case is to be tried and to a greater distance than one hundred miles from the place of trial, before the time of trial, or (5) when the witness is ancient or infirm; *Second*, in any case where it is necessary, in order to prevent a failure or delay of justice, any of the courts of the United States may grant a *dedimus potestatem* to take depositions according to common usage; and *Third*, any circuit court of the United States, upon application to it, as a court of equity, may, according to the usages of chancery, direct depositions to be taken *in perpetuam rei memoriam*, if they relate to any matter that may be cognizable in any court of the United States, and any court of the United States may, in its discretion, admit in evidence, in any case before it, any deposition so taken, which would be so admissible in a court of the state wherein such cause is pending, according to the laws thereof.⁴¹

⁴⁰ *Ex parte Flisk*, 113 U. S. 713-727 (28:1117); *Hanks Dental Association v. International Tooth Crown Company*, 194 U. S. 303-310 (48:989); *United States v. 5 Boxes & Packages of Lace*, 92 Fed. R. 601; *National Cash-Register v. Leland*, 77 Fed. R. 242, 37 C. C. A. 372, 94 Fed. R. 502; *Texas & P. R. Co. v. Wilder*, 35 C. C. A. 105, 92 Fed. R. 953; *Shellabarger v. Oliver*, 64 Fed. R. 306; *Tabor v. Indianapolis Journal Newspaper Co.*,

66 Fed. R. 423; *Seeley v. Kansas City Star Co.*, 71 Fed. R. 556; *Despaux v. Pennsylvania R. Co.*, 81 Fed. R. 897; *Zych v. American Car & Foundry Co.*, 127 Fed. R. 728; *Mulcahey v. Low Erie & W. R. Co.*, 69 Fed. R. 172.

⁴¹ U. S. Rev. Stat. secs. 861, 863, 866, 867; 3 Fed. Stat. Anno. 8-23; U. S. Comp. Stat. 1901, pp. 661-664; *Ex parte Flisk*, 113 U. S. 713-727 (28:1117); *Hanks Dental Association v. International Tooth*

§ 1072. **Same—Depositions de bene esse cannot be read if presence of witness can be procured.**—Depositions taken *de bene esse* under the federal statute cannot be read upon the trial, unless it appears to the satisfaction of the court, at the time of the trial, that (1) witness is dead, or (2) gone out of the United States, or (3) gone to a greater distance than one hundred miles from the place where the court is sitting, or (4) that by reason of age, sickness, bodily infirmity, or imprisonment, he is unable to travel and appear in court.⁴²

§ 1073. **Mode of taking depositions de bene esse—Either federal or state statutes may be followed.**—Depositions *de bene esse* may be taken in the instances particularly specified in the federal statute,⁴³ in accordance with the mode prescribed in the Revised Statutes of the United States,⁴⁴ or in accordance with the mode prescribed by the laws of the state in which the circuit court is held.⁴⁵ But a state statute cannot enlarge the exceptions established by the act of congress to the rule requiring the testimony and examination of witnesses in open court; the act of congress, allowing depositions to be taken in actions at law in the circuit courts of the United States, according to the state practice, simply adopts the mode or manner of taking and returning prescribed by the state law, and does not enlarge, nor permit the state to enlarge the exception to the rule requiring oral testimony in open court.⁴⁶

§ 1074. **Motions to suppress depositions—Should be opportunely made.**—Motions for the suppression of depositions, based upon the authority, manner and form of taking them, should be made before the case is called for trial, so as to afford opportunity to the party to retake the testimony or correct the defects in the taking of the deposition. It is the settled rule of

Crown Co., 194 U. S. 303-310 (48:989).

⁴² U. S. Rev. Stat. sec. 865; 3 Fed. Stat. Anno. 17; U. S. Comp. Stat. 1901, p. 663; *Harris v. Wall*, 7 How. 693 (12:875); *Whitford v. Clark*, 119 U. S. 522-525 (30:500); *Petapsco Ins. Co. v. Southgate*, 5 Pet. 604-623 (8:243).

⁴³ U. S. Rev. Stat. sec. 863; 3 Fed. Stat. Anno. 8; U. S. Comp. Stat. 1901, p. 661.

⁴⁴ U. S. Rev. Stat. secs. 863-865; 3 Fed. Stat. Anno. 8, 15, 17; U. S. Comp. Stat. 1901, pp. 661-663.

⁴⁵ 27 U. S. Stat. at L. ch. 14, p. 7; 3 Fed. Stat. Anno. 22; U. S. Comp. Stat. p. 664.

⁴⁶ *Hanks Dental Association v. International Tooth Crown Co.*, 194 U. S. 303-310 (48:989), and authorities cited; ante sec. 937.

the federal courts that the failure of a party to note objections to depositions, of the kind above stated, when they are taken, or to present them by a motion to suppress, or by some other notice before the trial is begun, will be held to be a waiver of the objections. The reason of the rule is that, whilst the law requires due diligence in both parties, it will not permit one of them to be entrapped by the acquiescence of the opposite party in an informality which he springs during the progress of the trial, when it is not possible to retake the deposition.⁴⁷

§ 1075. Surgical Examination of plaintiff in personal injury suits without his consent.—The circuit courts of the United States have no power under the common law, nor is there any federal statute vesting them with the power, to make and enforce an order requiring the plaintiff in an action at law brought to recover damages for injuries to the person, caused by the wrongful act of defendant, to submit, without his or her consent, upon application of the defendant, to a surgical examination of the person as to the extent of the injuries sued for, with the view of calling the physician or surgeon who makes the examination as a witness, to testify as to the results of his examination.⁴⁸ But, in obedience to the rule, established by the thirty-fourth section of the original judiciary act, that the rules of evidence prescribed by the laws of the several states in which the federal courts are, respectively, held, will be observed and enforced by those courts, except where the constitution, treaties or statutes of the United States shall otherwise require or provide,⁴⁹ a cir-

⁴⁷ Howard v. Stillwell & Brice Mfg. Co., 139 U. S. 199-210 (35:147); Bibb v. Allen, 149 U. S. 481-505 (37:819); Shutte v. Thomas, 15 Wall. 151 (21:123); Bank v. Seton, 1 Pet. 299 (7:152); Winans v. New York & E. R. Co., 21 How. 88 (16:68); York Mfg. Co. v. Illinois Cent. R. Co., 3 Wall. 107 (18:170); Doane v. Glenn, 21 Wall. 33 (22:476); Buddicum v. Kirk, 3 Cranch, 293 (2:444); Rich v. Lambert, 12 How. 347 (13:1017).

⁴⁸ Union Pacific Ry. Co. v. Botsford, 141 U. S. 250-259 (35:734).

⁴⁹ Vance v. Campbell, 1 Black, 427-431 (17:168); Wright v. Bales, 2 Black, 535-538 (17:264); McNeill v. Holbrook, 12 Pet. 84-90 (9:1009); Ryan v. Bindley, 1 Wall. 66-68 (17:559); Sims v. Hundly, 6 How. 1-11 (12:319); Connecticut Mutual Life Ins. Co. v. Union Trust Co., 112 U. S. 250-261 (28:708); Bucher v. Cheshire R. Co., 125 U. S. 555-585 (31:795); Nashua Savings Bank v. Anglo-American Land, Mortgage & Agency Co., 189 U. S. 221-232 (47:782).

cuit court of the United States will observe and enforce a statute of the state in which the court is sitting, which authorizes such surgical examination of the person in such actions.⁵⁰

§ 1076. **Same—Surgical examination does not contravene rule requiring oral testimony in open court.**—A state statute authorizing an order of court directing an involuntary surgical examination of the plaintiff in a personal injury suit, as to the extent of his injuries, for the purpose of calling the surgeon or physician to testify as to the results of the examination made by him, does not contravene the federal statute providing for the oral examination of witnesses in open court. On the contrary, whatever information may be obtained by the surgeon who examines the plaintiff under the state statute can be availed of only by the defendant's producing the witness and examining him in open court, or by deposition, if he come within some one of the exceptions mentioned in the federal statutes.⁵¹

§ 1077. **Cross-examination of witnesses confined to matters of direct examination—Exceptions to the rule.**—In the trial of actions at law, the established rule of practice in the federal courts is, that a party has no right, without leave of the court, to cross-examine a witness as to any facts and circumstances not connected with matters stated in the direct examination, subject to two necessary exceptions, namely: (1) on cross-examination the witness may be asked questions to show bias or prejudice, or (2) to lay the foundation to admit evidence of prior contradictory statements. Subject to these exceptions, the general rule has long been established in the federal courts, that the cross-examination must be limited to the matters stated in the direct examination, and if the adverse party wishes to examine the witness as to other matters he must do so by making him his own witness and calling him to testify as such in the subsequent progress of the trial of the cause.⁵²

When the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exer-

⁵⁰ *Camden & S. Ry. Co. v. Stetson*, 177 U. S. 172-177 (44:721).

⁵¹ *Camden & Suburban Ry. Co. v. Stetson*, 177 U. S. 172-177 (44:721).

⁵² *Wills v. Russell*, 100 U. S.

621-629 (25:607); *Houghton v. Jones*, 1 Wall. 702-706 (17:503); *Railroad Company v. Stimpson*, 14 Pet. 448-463 (10:535); *Sage v. Touszky*, Fed. Cas. No. 12,214.

cise of a sound discretion, and the exercise of that discretion is not reviewable on a writ of error.⁵³

§ 1078. Documentary evidence—Legislation of congress.— Although witnesses in civil actions at common law were required to give their testimony orally, in open court, upon the trial, and were not permitted to testify by deposition, it is also true that documentary evidence has, under certain restrictions, always been received in evidence, under the rules of the common law, in the trial of such actions. In this class of evidence were records, ancient deeds and wills which proved themselves; modern deeds, wills and other writings, which were required to be attested and verified by the parol evidence of witnesses, and books of account, or shop books, which had to be supported by the oath of the person who made the entries, or if he was dead his handwriting proved, before they could be read in evidence.⁵⁴ The admissibility of this kind of evidence in trials of civil actions at common law, was recognized in the original judiciary act,⁵⁵ and congress has, from time to time, passed many acts in amendment of the common law rules upon the subject.⁵⁶

§ 1079. Statutory power of federal courts to compel production of books and writings in evidence in trials at law.— The English common law judges possessed no power to compel the parties in actions at law to produce in evidence, upon the trial, books, writings, and papers, in their possession or power; but if a party to any such action desired to obtain such evidence, or, indeed, any evidence, from his adversary, he was compelled to file a bill of discovery against him in chancery, which caused inconvenience and delay, and greatly encumbered the administration of justice in the courts of common law, and had become a cause of animadversion upon common law procedure in England before the American Revolution.⁵⁷

In order to remedy this defect in common law procedure, obviate the necessity for a resort to chancery in such cases and to cure the resultant evil,⁵⁸ it was provided by the fifteenth

⁵³ *Rea v. Missouri*, 17 Wall. 532-545 (21:707); *Davis v. Coblens*, 174 U. S. 719-727 (43:1147).

⁵⁴ 3 Bl. Com. 367-369.

⁵⁵ 1 U. S. Stat. at L. ch. 20, sec. 15, p. 82.

⁵⁶ U. S. Rev. Stat. secs. 724, 882-

908; 3 Fed. Stat. Anno. 2, 3, 26-40; U. S. Comp. Stat. 1901, pp. 583, 669-679.

⁵⁷ 3 Bl. Com. 382.

⁵⁸ *Ryder v. Bateman*, 93 Fed. R. 31; *Crandall v. Plano Mfg. Co.*, 24 Fed. R. 738; *Owyhee Land Co. v.*

section of the original judiciary act, that: "In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances when they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default."⁵⁹

§ 1080. Same—The requisite procedure to obtain the order for production.—The requisite and appropriate procedure to obtain an order for the production of books or writings, to be used in evidence in the trial of an action at law, under the fifteenth section of the judiciary act, is for the party applying to file a written motion in the cause, alleging that there is in existence, and in the possession or power of the adverse party, books or writings which contain evidence pertinent to the issue or issues in the action, and pray for a rule or order upon him, requiring their production. Notice of the motion must be given to the party required to produce the books or writings, by service upon him or his attorney, a sufficient length of time for him to appear and show cause, if any he has, why the rule or order should not be made, when he may, in opposition to the motion, show by affidavit or otherwise that he has no such books or writings in his possession or power, or any other reason he may have why the rule or order should not be made. The matter should then be submitted to the court, and the court will hear proof, and grant or refuse the rule, according to the proof and the nature of the case. The proof should satisfy the court that the allegations of the petition made to obtain the rule are true, before production will be ordered.⁶⁰

Taulphaus, 109 Fed. R. 547; Gregory v. R. Co., 10 Fed. R. 529.

⁵⁹ U. S. Rev. Stat. sec. 724; 1 U. S. Stat. at L. ch. 20, sec. 15, p. 82; 3 Fed. Stat. Anno. 2, 3; U. S. Comp. Stat. 1901, p. 583.

⁶⁰ Lowenstein v. Carey, 12 Fed.

R. 811; Geyger v. Geyger, 2 Dall. 332 (1:403); Buell v. Connecticut Mut. Life Ins. Co., Fed. Cas. No. 2,103; Victor G. Bloede Co. v. Bancroft Co., 98 Fed. R. 175; Jacques v. Collins, 4 Blatchf. 23, Fed. Cas. No. 7,167.

§ 1081. **Same—Shall the production be at or before trial?**—There is some conflict of authority on this question. Some of the cases hold that the production must be at the trial, and at no other time.⁶¹ Other cases hold that, after issue joined, the court may order the production before trial, in order to give the moving party an opportunity for inspection, as a necessary part of his preparation for trial.⁶² Inspection in chancery was allowed before trial, upon the theory that the defendant, by referring to the books and writings in his answer, made them a part of it, and that they were deemed and taken to be a part of the record, and appeared to be material evidence for the plaintiff.⁶³

§ 1082. **Same—Limitations upon the power to compel production.**—The power, vested by the fifteenth section of the judiciary act, in the federal courts, to compel the production of papers, is not an unlimited power; by the very words of the statute, the parties can be required to produce them only “in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery.” The power of chancery to compel discovery and production, as that power existed when the statute was enacted, was taken as the measure of the extent of the power thereby vested in the courts of the United States to require production in the trials of actions at law.⁶⁴ “It is elementary knowledge,” that a defendant to a bill in chancery is not compellable to give any discovery which may subject him to a criminal accusation or prosecution, or to any punishment, or which may tend to convict him of any crime, or which may subject him to a penalty or forfeiture or to any loss in the

⁶¹ *United States v. National Lead Co.*, 75 Fed. R. 94; *Hylton v. Brown*, 1 Wash. 298, Fed. Cas. No. 6,981; *Triplett v. Washington Bank*, 3 Cranch (C. C.) 646, Fed. Cas. No. 14,178; *Jasigi v. Brown*, 1 Curt. 401, Fed. Cas. No. 6,993.

⁶² *Gray v. Schneider*, 119 Fed. 474; *Victor G. Bloede Co. v. Bancroft Co.*, 98 Fed. R. 175; *Heuszy v. Langdon-Heuszy Coal Min. Co.*, 80 Fed. R. 178; *Gregory v. R. Co.*, 10 Fed. R. 529; *Lucker v.*

Phoenix Assur. Co., 67 Fed. 18; *Exchange National Bank v. Washita Cattle Co.*, 61 Fed. R. 190; *Brewster v. Tuthill Springs Co.*, 34 Fed. R. 769; *Paine v. Warren*, 33 Fed. R. 357; *Coit v. North Carolina Gold Amalgamating Co.*, 9 Fed. R. 577.

⁶³ *Watson v. Renwick*, 4 Johns. ch. 381; 1 *Bates*, Fed. Eq. sec. 118.

⁶⁴ *Boyd v. United States*, 116 U. S. 616-641 (29:746); U. S. Rev. Stat. sec. 724.

nature of a penalty or forfeiture; nor is he compellable to make discovery of any thing immaterial to the issue; nor to produce his own title papers, unless they are also evidence for his adversary; nor is he compellable to discover privileged communications between attorney and client.⁶⁵ In addition to the restriction upon the power contained in the statute itself, parties are protected by those constitutional guaranties which secure the people against unreasonable searches and seizures, and against a person's being compelled to be a witness against himself in a criminal case.⁶⁶

§ 1083. **Same—Same—Immunity statutes.**—A statute which seeks to deprive parties and witnesses of their constitutional right to refuse to make disclosures and discovery or give testimony which will tend to criminate them or subject them to fines, penalties, or forfeitures, by an offer of immunity, must, in order to be sufficient and valid, afford absolute immunity against future prosecution for the offense to which the disclosures, discovery, or testimony relates; and it has been held by the federal supreme court that the immunity offered by section eight hundred and sixty of the United States Revised Statutes is insufficient and does not take away the protection of the constitutional guaranty.⁶⁷

§ 1084. **Subpoena duces tecum—Power of federal courts to issue.**—The courts of common law of England were vested with the power to compel, "by rule of court, or by adding a clause of requisition to the writ of subpoena, which is then called a *subpoena duces tecum*," the production in evidence, in trials of action at common law, books, writings and papers, which were in the possession or power of third persons, not parties to the action;⁶⁸ and it cannot be doubted that such power is vested in the district and circuit courts of the United States, in the trial of like actions. It is provided by the fourteenth section of the original judiciary act, that the circuit and district courts of the United States shall "have power to issue

⁶⁵ 1 Bates, Fed. Eq. Proc. secs. 118, 119 and 320, where the doctrine is stated at length, and the authorities, American and English are collected.

⁶⁶ *Boyd v. United States*, 116 U. S. 616-641 (29:746); *Lees v. Unit-*

ed States, 150 U. S. 476-483 (37:1150); *Counselman v. Hitchcock*, 142 U. S. 547-586 (35:1110).

⁶⁷ *Counselman v. Hitchcock*, 142 U. S. 547-586 (35:1110).

⁶⁸ 3 Bl. Com. 382.

all writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." A *subpoena duces tecum* is a writ; it is frequently necessary for the exercise of the court's jurisdiction; and it is "agreeable to the usages and principles of law," it being one of the ordinary and well established writs of the common law, at the time the judiciary act became a law. "It would be utterly impossible to carry on the administration of justice," without this writ of *subpoena duces tecum*,⁶⁹ and parties to actions at law in the courts of the United States are entitled to its benefits, and those courts are vested with the power to issue it.⁷⁰

§ 1085. **Same—Same—To obtain original papers in the general land office.**—It is provided by a recent federal statute, "that whenever the register of any United States land office shall be served with any *subpoena duces tecum* or other valid legal process requiring him to produce, in any United States court, or in any court of record of any state, the original application for entry of public land, or the final proof of residence and cultivation, or any other original papers on file in the general land office of the United States, on which a patent for land has been issued, or which furnishes the basis for such patent, it shall be the duty of such register to at once notify the commissioner of the general land office of the service of such process, specifying the particular papers he is required to produce, and, upon receipt of such notice from any register of a United States land office, the commissioner of the general land office shall at once transmit to such register the original papers specified in such notice, and which such register is required to produce, and to attach to such papers a certificate, under seal of his office, properly authenticating them as the original papers upon which patent was issued; and such papers so authenticated shall be received in evidence in all courts of the United States and in the several courts of the states of the union: Provided, that the secretary of the interior shall make

⁶⁹ *Summers v. Mosley*, 2 Cr. & M. 477; *Amey v. Long*, 9 East, 473; *Bull v. Loveland*, 10 Pick. 9; *U. S. Express Co. v. Henderson*, 69 Iowa, 40.

⁷⁰ *Hale v. Henkel*, 201 U. S. 43-89 (50:652); U. S. Rev. Stat. sec. 716; 1 U. S. Stat. at L. ch. 20, sec. 14, p. 81; 4 Fed. Stat. Anno. 498-499; U. S. Comp. Stat. 1901, p. 580.

rules and regulations to secure the return of such documents to the general land office, after use in evidence, without cost to the United States."⁷¹

§ 1086. Introduction of evidence—Order of proof.—The mode of conducting jury trials, in actions at law, in the circuit courts of the United States, and the order of introducing evidence, and the time when it is to be introduced, are, properly, matters belonging to the practice of the court in which the case is tried, and in regard to which the trial court is vested with a large discretion, which, in the absence of gross abuse, will not be revised upon writ of error. If every party had a right to introduce evidence at any time, at his election, without reference to the stage of the trial in which it was offered, the parties themselves would frequently be surprised by evidence destructive of their rights, which they could not have foreseen, or guarded against, the purposes of justice obstructed, and the court embarrassed in the conduct of the trial. The order of inquiry into the facts is matter of discretion in the court, and not of absolute right in the parties.⁷²

§ 1087. Objections to the admission of evidence—Must be specific.—The purposes of objecting to the admission of evidence are (1) to secure the ruling of the trial court excluding the evidence from the consideration of the jury; and (2), if the objection be overruled, to secure a revision of the ruling by the appellate court upon writ of error. If the objection be sustained, the other party may, likewise, have the ruling revised; but, to entitle either party to such revision, he must reserve an exception to the ruling of the trial court at the time it is made, and make it a part of the record by bill of exceptions. A general objection to the admission of evidence in trials at law is, as a general rule, insufficient. Such objections should be specifically stated. Objections to the admission of evidence must be of such a specific character as to indicate to the court and the adverse party distinctly the exact grounds

⁷¹ 33 U. S. Stat. at L. ch. 1398, p. 607); *Conrad v. Atlantic Ins. Co.*, 186; 10 Fed. Stat. Anno. 355. 1 Pet. 386-453 (7:189); *Goldsby*

⁷² *Philadelphia & Trenton R. Co. v. Stimpson*, 14 Pet. 448-463 (10: 535); *Wood v. United States*, 16 Pet. 342-366 (10:987); *Wills v. Russell*, 100 U. S. 621-629 (25: 607); *Conrad v. Atlantic Ins. Co.*, 1 Pet. 386-453 (7:189); *Goldsby v. United States*, 160 U. S. 70-77 (40:343); *Johnson v. Jones*, 1 Black, 209-227 (17:117); *Faust v. United States*, 163 U. S. 452-456 (41:224).

upon which the objecting party relies, so that the court may be enabled to rule advisedly upon them, and so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done. The rule is universal, that where an objection is so general as not to indicate the specific grounds upon which it is made, it is unavailing upon writ of error, unless it be of such a character that it could not have been obviated upon the trial. If the objection be general, and the evidence be admissible for any purpose, it will be overruled. It is the duty of a party objecting to evidence to point out clearly the part objected to, so that the attention of the court may be drawn to it; and if the objection covers any admissible evidence, it is rightly overruled.

It is a rule of law, enforced in the federal courts with great rigor, that where a party objects to the admission of evidence, and he excepts to the ruling of the trial court in admitting it, with the view of having that ruling revised upon writ of error, he is bound to state his objections specifically, and in the appellate court he will be confined to the objections so taken and stated in the trial court. If he assigns no ground of objection, the mere objection and exception cannot avail him. In examining the admissibility of evidence, the party ought to be confined, in both the trial court and in the appellate court, to the specific objection taken to it.⁷³

§ 1088. Same—Objections not specified are waived.—It is a well settled rule, that when, in the trial of an action at law, a party objects to the admission of evidence, and specifies his objection, the trial judge has the right to assume that all others are waived, and proceed with the trial of the case accordingly; and upon writ of error it will be considered that all other objections were waived by the party, or that there was no ground upon which others could stand.⁷⁴ Frivolous objections should

⁷³ Noonan v. Caledonia Gold Mining Co., 122 U. S. 393 (30:1061); Burton v. Driggs, 20 Wall. 125-137 (22:299); Hinde v. Langworth, 11 Wheat. 199-215 (6:454); United States v. McMaster, 4 Wall. 680-684 (18:311); Moore v. Bank, 13 Pet. 302-311 (10:172); Camden v. Doremus, 3 How. 515-534 (11:705); Toplitz v. Hedden,

146 U. S. 252-258 (36:961); Evanston v. Gunn, 99 U. S. 660-668 (25:306); Hamilton v. South Nev. G. & M. Co., 33 Fed. R. 568; Wood v. Welmer, 104 U. S. 786-797 (26:779).

⁷⁴ Evanston v. Gunn, 99 U. S. 660-668 (25:306); Belk v. Meagher, 104 U. S. 279-291 (26:735); Gould v. Day, 94 U. S. 405-414 (24:

never be made, but it is of the utmost importance that all valid objections should be specifically taken at the time the evidence is offered, or as soon as the objections appear, and those not so taken will be deemed by both the trial court and the appellate court to be waived.

§ 1089. Same—When the objection should be made.—It is a general rule that if no objection be made to the admission of evidence when it is introduced, objections to it are considered as waived; but to this rule there may be some exceptions. If the objectionable character of the evidence does not appear when it is introduced, then the objection should be made as soon as it becomes apparent that there is foundation for it. Much is left to the discretion of the court in conducting the trial. A party is not confined to any particular order in the introduction of his evidence, but may elect as to the order in which he will introduce it, unless a foundation must be first laid for its introduction. It is not necessary that evidence when offered to the jury should, *per se*, be competent, if, in fact, it be capable of being made competent, and is so made by other evidence, before the case is closed; but if it be apparently foreign to the issue, or inadmissible for any cause, its relevancy and connection should be shown, either by explanation to the court or by the introduction of other evidence showing its relevancy, and if that be not done the objection to it should be taken at once.⁷⁵ At all events, the objection to the evidence, and the exception to the ruling of the court upon it, must be taken upon the trial—that is, after the jury has been empanelled, and while they are still at the bar, and before they have retired to consider the case.⁷⁶

232); *Ry. Co. v. Hackett*, 58 Ark. 389, 41 Am. Rep. 108, 24 S. W. R. 883; *Railroad Co. v. Morgan*, 69 Ill. 492.

⁷⁵ *Baugham v. Graham*, 1 How. (Miss.) 220; *Lake v. Munford*, 4 Smed. & M. (Miss.) 312; *Dyson's Case*, 4 C. (Miss.) 362; *Hanna v. Renfro*, 3 George (Miss.) 125; *Dyson v. Baker*, 54 Miss. 24; *Myricks v. Wells*, 52 Miss. 149; *Dovany v. Koon*, 45 Miss. 71.

⁷⁶ *Campbell v. Boyrean*, 21 How.

223 (16:96); *Pittsburg, C. & St. L. R. Co. v. Heck*, 102 U. S. 120 (26:58); *Belk v. Meagher*, 104 U. S. 279-291 (26:735); *United States v. Breitling*, 20 How. 252 (15:900); *Walton v. United States*, 9 Wheat. 651-658 (6:182); *Dredge v. Forsyth*, 2 Black, 563-571 (17:253); *United States v. Carey*, 110 U. S. 51-52 (28:67); *Patrick v. Graham*, 132 U. S. 627-632 (33:460).

§ 1090. **Demurrer to the evidence**—When a party demurs to the evidence, he seeks thereby to withdraw the consideration of the facts from the jury, and is, therefore, bound to admit upon the record not only the truth of the evidence as given, but every fact which the evidence may legally conduce to prove in favor of the other party; and if, upon any view of the facts, the jury might have given a verdict against the party demurring, the court is also at liberty to give judgment against him. The testimony is to be taken most strongly against the party demurring, and such conclusions as a jury might justifiably draw the court ought to draw.⁷⁷ By a demurrer to the evidence, the court in which the cause is tried is substituted in the place of the jury, and the only question is, whether the evidence is sufficient to maintain the issue, and the judgment of the court upon such evidence will stand in the place of the verdict of the jury; and after that the defendant may take advantage of all defects in the declaration, not cured by the finding of the court, by motion in arrest of judgment, or by writ of error.⁷⁸ Without a joinder in demurrer, there can be no judgment upon a demurrer to evidence; and no such joinder ought to be permitted by the court while there is any matter of fact in controversy between the parties. It is no part of the object of such proceedings to bring before the court an investigation of the facts in dispute, nor to weigh the force of the testimony or the presumptions arising from the evidence; but the true and proper object of such a demurrer is to refer to the court the matters of law arising upon the facts, and it supposes the facts to be already admitted and ascertained, and that nothing remains but for the court to apply the law to those facts. No party can insist upon the other party's joining in the demurrer, without first distinctly admitting, upon the record, every fact, and every conclusion, which the evidence given for his adversary conduces to prove; and if there should be such a joinder without such admission, leaving the facts unsettled and indeterminate, it is a sufficient reason for refusing judgment upon the demurrer, and the judgment, if

⁷⁷ *Thornton v. Bank*, 3 Pet. 36-42 (7:592); *Pawling v. United States*, 4 Cranch, 219-224 (2:601); *Chinoweth v. Lessees of Haskell*, 3 Pet. 92-98 (7:614); *Fowle v.*

Alexandria, 11 Wheat. 320-324 (6:484); *Young v. Black*, 7 Cranch, 565-570 (3:440).

⁷⁸ *Bank v. Smith*, 11 Wheat. 171-183 (6:443).

any should be rendered, is liable to be reversed upon writ of error. The demurrer should admit and state the facts, and not merely the testimony which may conduce to prove them; it is to admit whatever the jury may reasonably infer from the evidence, and not merely the circumstances which form the ground and basis of conclusion.⁷⁹ A demurrer to evidence is allowed or denied in the exercise of a sound discretion by the court, under all the circumstances of the case; and it ought never to be admitted where the party demurring refuses to admit the facts which the evidence of the other side tends to prove, and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions.⁸⁰ A request by defendant's counsel to instruct the jury, "that if the evidence is believed by the jury to be true, the plaintiff is not entitled to recover," answers the same purpose, and is to be tested by the same rules of a demurrer to the evidence.⁸¹

§ 1091. Province of court and jury, respectively, in trials at common law.—Questions of law are to be determined by the court; questions of fact, by the jury. The authority of the jury as to the latter is as absolute as the authority of the court with respect to the former. No question of fact must be withdrawn from the determination of the jury, whose function it is to decide such issues. The line which separates the two provinces must not be overlooked by the court; and care must be taken that the jury is not misled into the belief that they are alike bound by the views expressed by the court upon the evidence, and the instructions given as to the law. The jury must be made to distinctly understand that what is said by the court as to the facts is advisory only, and in nowise intended to fetter the exercise finally of their own independent judgment. Within these limitations, it is the right and duty of the court to aid them, by recalling the testimony to their recollection; by col-

⁷⁹ *Fowle v. Alexandria*, 11 Wheat. 320-324 (6:484); *Young v. Black*, 7 Cranch, 565-570 (3:440); *Stiles v. Inman*, 55 Miss. 469; *Assurance Co. v. Mayer*, 64 Miss. 795; *Hicks v. Steegleman*, 49 Miss. 377; *Ware v. McQuillan*, 54 Miss. 703.

⁸⁰ *Young v. Black*, 7 Cranch, 565-570 (3:440).

⁸¹ *Parks v. Ross*, 11 How. 362-375 (13:730). For a form of demurrer to evidence see *Stiles v. Inman*, 55 Miss. 469.

lating its details; by suggesting grounds of preference where there is contradiction; by directing their attention to the most important facts; by eliminating the true points of inquiry; by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect, stripped of every consideration which might otherwise confuse them. How this duty shall be performed depends in every case upon the discretion of the judge. There is no duty more important resting upon those who preside at jury trials. Constituted as juries are, it is frequently impossible for them to discharge their functions wisely and well without this aid. In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting the case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error.⁸²

§ 1092. The court not controlled by state constitutions and laws as to the manner of instructing juries.—The federal judges, presiding in trials at common law, are not controlled by state constitutions and laws as to the manner of instructing juries upon the law of the case. The act of conformity does not extend to this branch of their duties. In this respect, their action is regulated and controlled by the rules of practice of the English common law, as those rules have been expounded and applied by the federal supreme court, and limited by the

⁸² *Nudd v. Burrows*, 91 U. S. 426-442 (23:286); *California Ins. Co. v. Union Compress Co.*, 133 U. S. 387-423 (33:730); *Vicksburg & Meridian R. Co. v. Putnam*, 118 U. S. 545-557 (30:257); *Carver v. Jackson*, 4 Pet. 1-101 (7:761); *Magniac v. Thompson*, 7 Pet. 348-398 (8:709); *M'Lanahan v. Universal Ins. Co.*, 1 Pet. 170-192 (7:98); *Gaines v. Stiles*, 14 Pet. 322-333 (10:476); *Eastern Transportation Line v. Hope*, 95 U. S. 297-303 (24:477); *Simmons v. United States*, 142 U. S. 148-155 (35:968); *United States v. Philadelphia & Reading R. Co.*, 123 U. S. 113-117 (31:138); *Lovejoy v. United States*, 128 U. S. 171-173 (32:389); *Rucker v. Wheeler*, 127 U. S. 85-96 (32:102); *St. Louis, Iron Mountain & Southern Ry. Co. v. Vickers*, 122 U. S. 360-363 (30:1161).

federal constitution and laws. Their instructions and charge may be delivered orally or in writing. The judge may direct a general or special verdict, as, in his sound judicial discretion, he may deem advisable in the interest of justice. He may discuss the evidence, and express an opinion upon the facts, being careful to submit their determination to the jury. He may restrict the jury to the instructions prepared by himself, or he may supplement them by special instructions prepared and submitted by the counsel of the parties, when he finds them correct and necessary to supply any omissions in the general charge; the essential thing being that he correctly charge the law of the whole case.⁸³

§ 1093. Duty of the court to submit all issues of fact to the jury.—It is absolutely essential to a common law jury trial, that all issues of fact be submitted to and decided by the jury; and it is the duty of the trial judge, who sits to preside over, direct and superintend the trial, to specifically submit all such issues to the decision of the jury. It is not sufficient that he refrain, merely, from assuming to himself the decision of such issues, but he must, by affirmative action, submit them to the jury, and require a decision of them, and it is error for the court to enter judgment so long as any material issue of fact remains undetermined. The duty of the judge is not fully met and discharged by instructing the whole law of the case; it is an essential element of his duty that he submit all issues of fact to the tribunal established by law for their determination, and to require their decision before a judgment can be lawfully entered.⁸⁴

⁸³ *Nudd v. Burrows*, 91 U. S. 426-442 (23:286); *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291-301 (23:898); *Vicksburg & Meridian R. Co. v. Putnam*, 118 U. S. 545-557 (30:257); *St. Louis, Iron Mountain & Southern Ry. Co. v. Vickers*, 122 U. S. 360-363 (30:1161); *Ruch v. Rock Island*, 97 U. S. 693-697 (24:1101); *Lincoln v. Power*, 151 U. S. 436-443 (38:224); *California Insurance Co. v. Union Compress Co.*, 133 U. S. 387-423 (33:730); *Grimes Dry Goods Co.*

v. Malcolm, 164 U. S. 483-492 (41:524); *United States Mutual Accident Assoc. v. Barry*, 131 U. S. 100-123 (33:60).

⁸⁴ *Hodges v. Easton*, 106 U. S. 408-413 (27:169); *Patterson v. United States*, 2 Wheat. 221-226 (4:224); *Barnes v. Williams*, 11 Wheat. 415-417 (6:508); *Prentice v. Zane*, 8 How. 470-490 (12:1160); *Ward v. Cochran*, 150 U. S. 597-610 (37:1195); *Richardson v. Boston*, 19 How. 263-271 (15:639); *Chesapeake & Ohio Canal Co. v.*

§ 1094. Duty of the court to charge the law of the whole case.—It is the duty of the court to give in charge the law of the whole case, and if there be any evidence tending to support a controverted fact it should be submitted to the jury with appropriate instructions; and if it has omitted to charge upon any material point in the case, it is error to refuse a requested instruction, if it be a correct statement of the law, applicable to such omitted point.⁸⁵ But it is the settled law that, if the charge given by the trial court covers the entire case, and submits it properly to the jury, it may refuse to give the instructions asked by the parties, even if correct in point of law; the court may use its own language, and present the case to the jury in its own way, and if the charge as given presents the law of the whole case, and properly submits all issues of fact to the jury, the mode and manner of doing so are immaterial. No court is bound at the mere instance of a party to repeat over to the jury the same substantial propositions of law in every variety of form which the ingenuity of counsel may suggest. It is sufficient, if it is once laid down in an intelligible and unexceptionable manner.⁸⁶

§ 1095. Requested instructions—Sound and erroneous propositions asked in the aggregate.—When a party, or his counsel, asks the court to give to the jury a series of instructions in the aggregate, and there is any thing exceptionable in either of them, or if a request to instruct contains one unsound proposition, and many sound propositions, the whole may be properly rejected by the court; and an exception to the ruling will be unavailing upon writ of error.⁸⁷

Knapp, 9 Pet. 541 (9:222); Hogan v. Page, 2 Wall. 606-609 (17:854).

⁸⁵ Thorwegan v. King, 111 U. S. 549 (28:514); Chesapeake & Ohio Canal Co. v. Knapp, 9 Pet. 541 (9:222); Hogan v. Page, 2 Wall. 605 (17:854).

⁸⁶ Kelly v. Jackson, 6 Pet. 622-633 (8:523); Laber v. Cooper, 7 Wall. 565-571 (19-151); Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291-301 (23:898); Iron Silver Mining Co. v. Cheesman, 116 U. S. 529-538 (29:712); Ruch v. Rock

Island, 97 U. S. 693-697 (24:1101); Texas & Pacific R. Co. v. Cody, 166 U. S. 606 (41:1132); Ayers v. Watson, 137 U. S. 584 (34:803); Marchand v. Griffon, 140 U. S. 516 (35:527); Anthony v. Louisville & N. R. Co., 132 U. S. 170 (33:301); Grand Trunk R. Co. v. Ives, 144 U. S. 408 (35:484); New York L. E. & W. R. Co. v. Winter, 143 U. S. 60 (36:71); Ormsby v. Webb, 134 U. S. 47 (33:805).

⁸⁷ Indianapolis & St. Louis R. Co. v. Horst, 93 U. S. 291-301 (23:

§ 1096. Court not required to submit special issues to the jury.—The judges presiding in the trial of actions at law in the circuit courts of the United States are not bound to submit special issues to the jury and require a special verdict, although the law of the state where the court is held requires the courts of the state upon the request of a party to submit such issues. The federal judges may, in their discretion, submit special questions of fact to the jury in accordance with the state practice, or they may require a general verdict.⁸⁸

§ 1097. Peremptory instructions.—It is the settled law of the supreme court, that, when the evidence given at the trial, with all the inferences which the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the trial court is not bound to submit the case to the jury, but may direct a verdict for the defendant.⁸⁹ And it is well settled that the trial court may withdraw a case from the jury altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such a conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict in opposition to it.⁹⁰

§ 1098. Same—Existence of negligence or contributory negligence a question for the jury.—It is well settled that where

898); *Harvey v. Tyler*, 2 Wall. 328-350 (17:871); *Eastern Transportation Line v. Hope*, 95 U. S. 297-303 (24:477); *Beaver v. Taylor*, 93 U. S. 46 (23:797); *United States v. Hough*, 103 U. S. 71-74 (26:305); *Worthington v. Mason*, 101 U. S. 149-153 (25:848).

⁸⁸ *Grimes Dry Goods Co. v. Malcolm*, 164 U. S. 483-492 (41:524); *United States Mutual Accident Assn. v. Barry*, 131 U. S. 100-123 (33:60); *Nudd v. Burrows*, 91 U. S. 426 (23:286); *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23:898).

⁸⁹ *Schofield v. Chicago, Milwaukee & St. Paul Ry. Co.*, 114 U. S. 615-619 (29:224) and cases cited.

⁹⁰ *Delaware, Lackawana & Western R. Co. v. Converse*, 139 U. S. 469-477 (35:213) and cases cited; *Union Pacific R. Co. v. McDonald*, 152 U. S. 262-284 (38:434), and authorities cited; *Anderson County Comrs. v. Beal*, 113 U. S. 227-242 (28:966); *McGuire v. Blount*, 199 U. S. 142-148 (50:125).

In *McGuire v. Blount*, *supra*, Mr. Justice Day, delivering the opinion of the court, said: "It is clear that when the court would be bound to set aside a verdict for want of testimony to support it, it may direct a finding in the first instance, and not await the enforcement of its views by granting a new trial."

there is uncertainty as to the existence of either negligence, or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this is true whether the uncertainty arises from a conflict in the testimony, or because the facts being undisputed, fair-minded men will honestly draw different conclusions from them.⁹¹ But where the evidence is conclusive against negligence, the court will direct a verdict.⁹²

§ 1099. Same—Motion for peremptory instruction should not be made until the evidence closes.—It has been repeatedly held by the supreme court, that a request for a ruling that, upon the evidence introduced, the plaintiff is not entitled to recover, cannot be made by the defendant as a matter of right, unless at the close of the whole evidence; and that, if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error. If, after the refusal of the court to grant the defendant's request, he goes on with his defense, and introduces testimony of his own, and the jury, under proper instructions, finds against him upon the whole evidence, the judgment cannot be reversed upon writ of error on account of the refusal of the court to make the ruling, even though it would not have been wrong to give the instruction at the time it was asked. The defendant, by proceeding with his defense, waives the right to assign error upon the ruling of the court against him.⁹³

§ 1100. Duty of federal judges to give in charge the law of the state to the jury.—The dual character of the government established by the federal constitution comes distinctly and actively into play, in trials of civil actions at common law in the circuit courts of the United States, calling for the application and administration of the laws of the states where

⁹¹ *Richmond & Danville R. Co. v. Powers*, 149 U. S. 43-47 (37:642); *Delaware, Lackawana & Western R. Co. v. Converse*, 139 U. S. 469-477 (35:213); *Washington & Georgetown R. Co. v. McDade*, 135 U. S. 554-575 (34:235); *Sioux City & Pacific R. Co. v. Stout*, 17 Wall. 657-665 (21:745).

⁹² *Elliott v. Ry. Co.*, 150 U. S. 245-249 (37:1068).

⁹³ *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202-208 (36:405); *Trunk R. Co. v. Cummings*, 106 U. S. 700 (27:266); *Accident Ins. Co. v. Crandal*, 120 U. S. 525 (30:740); *Northern Pacific R. Co. v. Mares*, 123 U. S. 710 (31:296); *Robertson v. Perkins*, 129 U. S. 233 (32:686).

those courts are respectively held. It is enacted by the thirty-fourth section of the original judiciary act, "that the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply."⁹⁴ Here is a distinct and unequivocal recognition of the principle that the constitution, valid treaties and statutes of the United States are the supreme law of the land, and also a declaration of the municipal sovereignty of the states, and that their laws, with some few exceptions, control in all matters of local government. "The laws of the several states" embrace, not only their conventional law—their constitutions and statutes—but also their local usages, customs and common law, together with the body of rules and jurisprudence established by judicial construction and the settled course of decisions of their highest courts; and this body of state laws, composed of these various elements, are to be treated as the law of the states by the federal courts, and binding on them "as rules of decision," in the states in which they are respectively held, and to be given in charge by them to the jury in trials at common law, "in cases where they apply."⁹⁵

§ 1101. Same—Must maintain the supremacy of the federal constitution.—The constitution and valid treaties and statutes of the United States are the supreme law of the land, and all the judicial officers of the national government are bound by oath or affirmation to support the constitution;⁹⁶ and, in all trials of civil actions at common law in the circuit courts of the United States, in which any right, title, privilege, or immunity is claimed by a party to the action under the constitution or a valid treaty, or a law of the United States, in contravention of any rule of law, statute, or constitutional provision of the state in which the court is sitting and the trial is being had, and which is brought forward for the purpose of defeating the right, title, privilege, or immunity so claimed, there being in the case a conflict between federal and state

⁹⁴ 1 U. S. Stat. at L. ch. 20, sec. 34, p. 92; U. S. Rev. Stat. sec. 721; 4 Fed. Stat. Anno. 517; U. S. Comp. Stat. 1901, p. 581.

⁹⁵ *Bucher v. Cheshire R. Co.*, 125

U. S. 555-585 (31:795); *Burgess v. Seligman*, 107 U. S. 20-38 (27:359); *Luther v. Borden*, 7 How. 40 (12:598).

⁹⁶ U. S. Const. Art. VI.

authority, it is the plain and unequivocal duty of the trial judge to maintain the supremacy of the federal constitution, or law or treaty, and to accordingly instruct the jury, or otherwise enforce the right claimed under it, by due and orderly procedure, and not remit the party to his writ of error for the assertion of his right in an appellate court. It is the duty of the trial court to enforce the constitution and laws of the United States, as much so as it is the appellate courts. If it be made to clearly appear that the state law is repugnant to the federal constitution, there is no reason why the trial court should not so instruct the jury, and direct a verdict in conformity to its opinion.⁹⁷

§ 1102. Withdrawal of the jury from the bar to deliberate upon their verdict.—In the trial of a civil action at common law, when all the evidence on both sides had been introduced and admitted, the trial judge, orally, in the presence of the parties and their counsel, in open court, summed up the whole of the evidence to the jury, omitting all superfluous circumstances, defining the main questions and principal issues in the cause, and pointing out what evidence had been submitted relevant to them, with such directions as he deemed necessary or appropriate to aid them in reaching a conclusion, and giving them his opinion in all matters of law arising upon the evidence; and then the jury, unless the case was a very clear one, withdrew from the bar to deliberate upon their verdict, and, when they had unanimously agreed, they returned to the bar and delivered their verdict, and, when it was received by the court and recorded, they were discharged, and that ended the trial.⁹⁸ In retiring from the bar to deliberate, the jury could, by leave of the court, carry with them, of the evidence that had been submitted to them, letters patent, and deeds under seal, and exemplifications of the testimony of witnesses which had been taken in chancery, the witness at the time of trial being dead; but books or writings not under seal were not, without the consent of the parties, delivered to the jurors nor carried with them upon their retirement. The jury might, by leave of the trial judge, return into court, to hear further

⁹⁷ *Scott v. Donald*, 165 U. S. 58-107 (41:632); *Barry v. Edmunds*, 116 U. S. 550-566 (29:729) *Fletcher v. Peck*, 6 Cranch, 87-148 (3:162).

⁹⁸ 3 Bl. Com. 375-378; 2 Tidd's Prac. (1807) 795.

evidence upon any issue of fact in the case in regard to which they were in doubt, any objection to which might be made of record and the matter revised upon writ of error.⁹⁹ This procedure of the English common law, in all its essential elements, is the rule in the trial of civil actions at common law in the circuit courts of the United States, and especially so as to what papers the jury may take with them upon their retirement from the bar. In such matters, the federal judges, presiding at jury trials, are not controlled by state procedure; and a state statute directing that all instructions to the jury and all modifications of requested instructions shall be in writing, and that the written instructions and papers read in evidence shall be taken by the jury on their retirement from the bar and returned with their verdict, is not within the act of conformity and not operative or of any force and effect in the federal circuit courts.¹

§ 1103. The verdict of the jury—Either general or special.—By the ancient common law, the only effectual and legal verdict which a jury could render was a general verdict, rendered publicly, in open court, in which they openly declared that they found the issue or issues for the plaintiff, or for the defendant, and if for the plaintiff they assessed the damages sustained by him in consequence of the injury upon which the action was brought; which verdict was received by the court and entered upon the record. In a verdict for defendant in an action of replevin, the jury assessed his damages. In actions purely real, no damages were recoverable. But, by authority of an English statute, old enough to be common law in the colonies and in the several states of the union, the jury were allowed, in cases of difficulty in matters of law, to find and give a special verdict, in which they stated the naked ultimate facts as they found them to be proved by the evidence, and prayed the advice of the court thereon, concluding conditionally, that, if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then found for the plaintiff, if otherwise, then for the defendant; and the verdict was entered at length upon the record, and afterwards argued and the questions of law arising upon the facts found determined as in case of de-

⁹⁹ 2 Tidd's Prac. (1807) 795; *Offit v. Vick*, Walker (Miss.) 99.

¹ *Nudd v. Burrows*, 91 U. S. 426-442 (29:286); *United States*

Mutual Accident Association v. Barry, 131 U. S. 100-123 (33:60); ante secs. 938, 939.

murrer, in the court at Westminster from whence the issue came to be tried. Another method of finding a species of special verdict, was when the jury found a verdict generally for the plaintiff or defendant, but subject nevertheless to the opinion of the court out of which the issue came to be tried, on a *special case*, stated by counsel on both sides with regard to a matter of law; and in a *special case*, as in a *special verdict*, it was requisite that the facts proved at the trial should be stated, and not merely the evidence of the facts, but they were not entered on the record.²

§ 1104. **Same—Special verdict defined and practice on it stated.**—Inasmuch as the federal courts are still controlled by the rules of the common law in the manner of submitting a cause to the jury, and as to the form of the verdict, and the requisites of a special verdict, and the proceedings upon it in both the trial court, and upon writ of error,³ it becomes important to take notice of those rules, as they have been stated by the supreme court. The result of the decisions of that court upon the subject may be stated as follows: A special verdict is where the jury distinctly find all the essential ultimate facts in the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole facts thus found by them, that the plaintiff has a good cause of action and is entitled to recover, then they find for the plaintiff, and assess his damages at a stated amount; and if otherwise, they then find for the defendant; and it is of the very essence of a special verdict, that the jury should find all the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found; and if the verdict find but part of the issue or issues, and says nothing as to the rest it is insufficient, because the jury have

² 3 Bl. Com. 377-378; 2 Tidd's Prac. (1807) 806-811; Fletcher v. Peck, 6 Cranch, 87-148 (3:162); Dartmouth College v. Woodward, 4 Wheat. 518-715 (4:629); Chesapeake Ins. Co. v. Stark, 6 Cranch, 268-273 (3:220); Prentice v. Zane, 8 How. 470-489 (12:1160); Suydam v. Williamson, 20 How. 427-442 (15:978); Graham v. Bayne,

18 How. 60-63 (15:265); Mumford v. Wardell, 6 Wall. 423-439 (18:756); Barnes v. Williams, 11 Wheat. 415-417 (6:508); Buchanan v. Delaware Ins. Co., 7 Cranch, 434-435 (3:396); Stephen, Pl. (Philadelphia ed. 1824) 112-114.

³ Ante secs. 939, 940, 1051, 1091, 1092, 1093, 1094.

not tried the whole case, and until they have decided all the material issues of fact in the cause the court cannot lawfully render judgment; a special verdict, having found all the essential facts in the case, with a conditional finding in favor of the plaintiff or defendant, is a proper foundation for a judgment in favor of either, according as the law of the case on the facts found and entered upon the record may require, and the judgment of the trial court upon such verdict, whether for plaintiff or defendant, may be re-examined upon writ of error in the appellate court without any bill of exceptions; and every special verdict, in order to enable the appellate court to act upon it, and re-examine the judgment entered upon it, must find the essential ultimate facts, and not merely state the evidence of the facts, and must be entered upon the record, for where the verdict states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon the matters so found, nor unless it be entered upon the record. In practice the formal preparation of a special verdict is performed by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars upon which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them. After the special verdict is arranged, and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision except the questions of law inferentially arising upon the facts stated in the special verdict, and incorporated in the record.⁴

§ 1105. Same—Same—Distinction between a special verdict at common law, and special issues under state statutes.—There is a material and important distinction between a special verdict at common law, and what are sometimes called “special

⁴ *Suydam v. Williamson*, 20 How. 427-442 (15:978); *Mumford v. Wardell*, 9 Wall. 423-439 (18:756); *Prentice v. Zane*, 8 How. 470-489 (12:1160); *Barnes v. Williams*, 11 Wheat. 415-417 (6:508); *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268-273 (3:220).

issues'' under the statutes of some of the states. The former is a complete substitute for a general verdict, covers all the issues, and finds all the essential facts in the case, and prays the advice of the court, and refers to it the questions of law arising upon the facts so found.⁵ The latter does not usually dispense with the necessity of a general verdict, nor cover the whole case, but requires the jury to find specially upon particular questions of fact involved in the issues of the case, and to return their answers to such questions of fact in connection with a general verdict,⁶ it being the purpose and intendment of such state statutes that the special answers or findings, even when inconsistent with the general verdict, shall control in determining what judgment shall be rendered in the case.⁷

§ 1106. **Same—A "special case" defined.**—A "special case" is purely a common law proceeding, and was resorted to by the parties when they desired to speedily obtain the decision of the court in bank upon the facts of the case, without the delay and expense incident to a special verdict or demurrer to the evidence, and with no view to a writ of error to revise the judgment. The proceedings in a special case was as follows: The cause was regularly brought to trial, and submitted to a jury, and a general verdict was taken for one of the parties, "subject to a special case;" that is, subject to a written statement of all the facts of the case proved at the trial, drawn up for the opinion of the court in bank, by the counsel and attorneys on both sides and signed by them, under the direction of the judge at *nisi prius*, according to the principle of a special verdict. The statement was drawn up and signed before the jury were discharged, and if, in settling it, any difference arose about a fact, the opinion of the jury was taken, and the fact stated accordingly. The party for whom the general verdict was given was not entitled to enter judgment thereon, until the court in bank had decided on the "special case," and, according to that decision, the judgment was ulti-

⁵ Ante secs. 1103, 1104.

⁶ *Indianapolis & St. Louis Railroad Co. v. Horst*, 93 U. S. 291-301 (23:898); *United States Mutual Accident Association v. Barry*, 131 U. S. 100-123 (33:60); *Grimes Dry*

Goods Co. v. Malcolm, 164 U. S. 483-492 (41:524).

⁷ *New Orleans Ins. Asso. v. Piaggio*, 16 Wall. 378-390 (21:358); *Walker v. New Mexico & Southern Pacific R. Co.*, 165 U. S. 593-603 (41:837)

mately entered either for him or his adversary. The court could render no judgment except upon the facts stated in the "special case," and, if the facts were misstated, the parties might apply to amend it, or if it was so defective that the court were unable to give judgment upon it, they would grant a new trial in order to have it restated. A "special case" was not, like a special verdict, or a demurrer to the evidence, entered upon the record, and therefore, the judgment could not be revised upon writ of error.* According to the common law rule, there could be no "special case" stated, except upon a general verdict, "subject" to it. rendered upon a regular trial; but, by a modern act of Parliament, after issue joined, the parties were permitted, by consent and the order of a judge, to state the facts of the case in the form of a special case, for the opinion of the court, and to agree that a judgment should be entered for the plaintiff or defendant, immediately after the decision of the case according to the opinion of the court, obviating the necessity of a trial and verdict as the foundation of a special case, where the parties could agree upon the facts.⁹

§ 1107. Same—Same—"Special case" and "agreed case" recognized as proper procedure in the federal courts.—In the federal courts, the common law rule has been so far modified, as to authorize the facts in a "special case" to be entered upon the record, and made the basis of the trial court's judgment, and also of a writ of error without bill of exceptions; and the same principle is applied to an "agreed case." The supreme court has declared that, according to the rules established by it, where, in civil actions at common law in the federal circuit courts, there is no dispute in regard to the facts, and, consequently, no necessity for any ruling of the court in admitting or rejecting evidence, a special verdict may be taken, or an agreed statement of facts drawn up and entered upon the record and submitted directly to the court for its decision without the intervention of a jury, or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed to and entered upon the record, and a judgment

* Stephen, Pl. (Philadelphia ed. (2:402); Brent v. Chapman, 5 1824) 114; 2 Tidd's Prac. (1807) Cranch, 358-361 (3:125).
808-810; Mumford v. Wardell, 6
Wall. 423-429 (18:756); Faw v. * Act Aug. 14, 1833, 3 and 4, Will. IV, ch. 42, XXV; 1 Chitty, Roberdeau, 3 Cranch, 173-178 Pl. (12th Am. ed.) 719, 720.

entered in accordance with the opinion of the court upon the facts; and in either case, the aggrieved party may, after final judgment, without bill of exceptions, upon writ of error, have the questions of law arising upon the facts, so spread upon the record, re-examined by the supreme court, or, now, by the United States circuit courts of appeal, in cases where those courts have jurisdiction.¹⁰

§ 1108. The verdict must find all the material issues of fact. In the trial of civil actions at law, in the courts of the United States, in the absence of an agreement, waiver, or consent of the parties, the verdict of the jury, whether general or special, must find all the material issues of fact in the case, and which are essential to entitle a party to judgment. Where all the issues are properly submitted by the court to the jury, and they return a general verdict, such verdict is, in legal intentment, a decision of all the issues submitted; but where the jury give a special verdict, it must affirmatively appear from the face of it that it contains a finding of all the facts essential to the rendition of a judgment in favor of either the plaintiff or defendant. The necessity for this completeness in the finding of the issues of fact is rendered absolute by virtue of the right of trial secured to the parties by the constitution, and the express direction of the statute in pursuance thereof made; and no state statute directing the manner of submitting causes to the jury, or prescribing the forms of verdicts, nor any other device, can authorize a judge, presiding in the trial of a civil action at law, in a circuit court of the United States, to enter judgment until all the material issues of fact have been decided by the jury.¹¹

¹⁰ *Suydam v. Williamson*, 20 How. 427-442 (15:978); *Faw v. Roberdeau*, 3 Cranch, 173-178 (2:402); *Brent v. Chapman*, 5 Cranch, 358-361 (3:125); *Mumford v. Wardell*, 6 Wall. 423-439 (18:756); *Hartnft v. Weigmann*, 121 U. S. 609-616 (30:1012); *Supervisors v. Kennicott*, 103 U. S. 554-558 (26:486.)

¹¹ U. S. Const. VII, Amndt.; U. S. Rev. Stat. sec. 648; *Hodges v. Easton*, 106 U. S. 408-413 (27:

169); *New Orleans Ins. Asso.*, 16 Wall. 378-390 (21:358); *Prentice v. Zane*, 8 How. 470-489 (12:1160); *Chesapeake Ins. Co. v. Stark*, 6 Cranch, 268-273 (3:220); *Barnes v. Williams*, 11 Wheat. 415-417 (6:508); *Buchanan v. Delaware Ins. Co.*, 7 Cranch, 434-435 (3:396); *Ward v. Cochran*, 150 U. S. 597-610 (37:1195).

In *Barnes v. Williams*, *supra*, in which there was a special verdict, but the jury failed to find one is-

§ 1109. Same—The federal rule accords with the common law rule.—The federal rule, stated in the section next preceding, requiring that all material issues of fact shall be determined by the jury, as an absolute condition precedent to the rendition of a judgment, is in perfect accord with the procedure of the English common law. In all trials of civil actions at law, in the common law courts of England, before the procedure was changed by statute, whether the issues of fact were determined by a general verdict, or a special verdict, or a “special case,” the issues were either found by the jury, or the statement of the facts assented to by them. Even in settling the statement in a “special case,” if any difference arose about any fact, the opinion of the jury was taken upon it; and for that reason they were not discharged until the statement of the facts had been settled and signed, in accordance with the evidence adduced at the trial.¹²

§ 1110. The legal effect of verdicts determined by state law. When, in a civil action at common law, in a circuit court of the United States, the jury returns a verdict, finding all the material issues of fact in the case, in accordance with the common law rule, and the federal rule, stated in the two sections next preceding, then the legal effect and operation of that verdict upon the rights of the parties embraced within those issues and so decided are to be determined and ascertained by the law of the state where the court is held and the trial is had. The decision of the issues of fact must be made in accordance with the law of the forum; the legal effect of the decision, when so made, must be defined and determined by the law of the place where made. Such is the rule announced by the federal supreme court.¹³

sue of fact necessary to the plaintiff's right to recover, but instead stated the evidence of the fact, upon which the trial court rendered judgment in his favor, Chief Justice Marshall, upon writ of error, delivering the opinion of the court, said:

“Although in the opinion of the court there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it,

and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plaintiff.”

¹² Ante secs. 1103, 1104, 1105, 1106, and authorities cited under each of them.

¹³ Glenn v. Sumner, 132 U. S. 152-157 (33:301); Bond v. Dustin,

§ 1111. **Writs of inquiry.**—At the common law, in actions sounding in damages, where the defendant made default, or where judgment *quod recuperet* was rendered against him upon an issue of law, the judgment of the court was in the first instance interlocutory, that the plaintiff ought to recover his damages, without specifying their amount, and a writ of inquiry was awarded to have them assessed by a jury of the county, and commanding that the inquisition, when made, be returned into court.¹⁴ The value of this writ in the administration of justice was recognized by the first congress of the United States, as evidenced by the twenty-sixth section of the judiciary act, which is as follows:

“That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or non-performance shall appear by default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.”¹⁵ It will be observed that the right to a writ of inquiry is not placed by the judiciary act upon the same high footing as the right to a trial of civil actions at law by a jury; and this is according to the reason and principles of the English common law. The writ was never awarded so long as there was any issue of fact to try; it was a judicial writ awarded to ascertain the amount of the damages which had already been adjudged to the plaintiff; it was “a mere inquest of office to inform the conscience of the court,” who, if they pleased, might themselves assess the damage, and it was accordingly the practice in actions upon promissory notes and bills of exchange, covenants and awards, instead of executing a writ of inquiry, to apply to the court for a rule to show cause why it should not be referred to a master to ascer-

112 U. S. 604–609 (28:835); *Sawin v. Kenny*, 93 U. S. 289–291 (23:926.)

¹⁴ Stephen, Pl. (Philadelphia ed. 1824) 126–128; 2 Tidd's Prac. (1807) 513–525.

¹⁵ 1 U. S. Stat. at L. ch. 20, sec. 26, p. 87; U. S. Rev. Stat. sec. 961; 4 Fed. Stat. Anno. 604; U. S. Comp. Stat. 1901, p. 699; *Sun Printing & Publishing Asso. v. Moore*, 183 U. S. 642–674 (46:366).

tain the principal and interest due, and why judgment final should not be entered for the amount found due, without executing a writ of inquiry, and the rule was made absolute on an affidavit of service, unless good cause was shown to the contrary.¹⁶

§ 1112. **Amending the verdict.**—In the trial of civil actions at common law, in the circuit courts of the United States, as shown in previous sections, all the material issues of fact in the case must be found by the jury; this rule is fundamental, having its origin in the federal constitution, and the trial by jury secured by that instrument, and any amendment of the verdict of the jury must be made in subordination to the rule. The court cannot, by amendment, find a fact which the jury have not found by their verdict.¹⁷

The courts of law of England, when acting altogether upon the principles of the common law, unaided by statute, would amend a verdict actually rendered by the jury and received and recorded, if, from the pleadings and the evidence in the cause, the court was satisfied that, in the form in which it was given by the jury, it did not accomplish what they intended, and did, on that account, fail to do justice to the party in whose favor they had found. In the federal courts, the sufficiency of the finding by the jury to constitute a legal verdict upon the issues joined, and to make it operate as such, and to authorize the court to render a judgment upon it, depend upon the rules of the common law, except in so far as they have been modified by the acts of congress. The sufficiency of the finding must be tested by the rules of the common law, and the statutes of the United States. Although the verdicts of juries are not specifically mentioned in the thirty-second section of the judiciary act, they are within its intendment and cannot be excluded from its operation; the provisions of the section extend to the “imperfections, defects, and want of form” in the finding of juries, as well as to the other proceedings in a suit. And, although the verdict of a jury may be imperfect, defective, or wanting in form, yet if, when considered in connection with the pleadings and the evidence in the case, its substantial meaning and intent are manifest, and from that meaning and

¹⁶ 2 Tidd's Prac. (1807) 513-525.

¹⁷ Ante secs. 1052, 1103, 1104, 1105, 1106 and authorities cited.

intent, so made manifest, the finding is sufficient to constitute a legal verdict upon the issues joined, the imperfections, defects and want of form are cured by the operation of the statute, and the court should amend it, "and give judgment according as the right of the cause and matter in law shall appear unto them."¹⁸

§ 1113. **Same—"Manifest intent of the jury."**—While the subject of amending verdicts is by no means free from difficulty, it may be safely affirmed that a general rule is deducible from the federal authorities. That rule is: In order to amend a verdict in any event, the defect in it, as actually rendered, must be of such a character as not to prevent the court from lawfully rendering judgment upon it according to the "manifest intent of the jury," if that "manifest intent" can be ascertained by the court, which must be arrived at by a consideration and examination of the verdict, as actually rendered, and the pleadings in the cause, and the evidence adduced upon the trial; and if, from such examination and consideration, it is manifest that the jury intended to find all the facts within the issue or issues made by the pleadings which are essential to the rendition of a judgment for the party in whose favor the verdict was rendered, the court will amend it so as to make it express such intent, and enter judgment accordingly.¹⁹

§ 1114. **Defects cured by verdict—Common law rule.**—One of the most important rules of the common law procedure, and one which is of very great value in the administration of justice, is the rule that certain defects in pleading are aided or cured by the verdict of the jury, and are, therefore, not available to the parties upon motion in arrest of judgment. The stereotyped statement of the rule is as follows:

"Where there is any defect, imperfection, or omission in any pleading, whether in substance or in form, which would have

¹⁸ *Parks v. Turner*, 12 How. 39-47 (13:883); *Roach v. Hulings*, 16 Pet. 319-326 (10:979); *Van Ness v. Bank of the United States*, 13 Pet. 17-22 (10:38); *Laber v. Cooper*, 7 Wall. 565-571 (19:151); *Snyder v. United States*, 112 U. S. 216-217 (28:697); *Gay v. Joplin*, 13 Fed. R. 650; *Paige v. Loring*, Fed. Cas. No. 10,672; *Hopkins v.*

Orr, 124 U. S. 510-515 (31:523); *Quantity Manufactured Tobacco*, 5 Ben. 457, Fed. Cas. No. 16,106a; *Murphy v. Stewart*, 2 How. 262-284 (11:261).

¹⁹ *Parks v. Turner*, 12 How. 39-47 (13:883); *Hopkins v. Orr*, 124 U. S. 150-515 (31:523); Ante sec. 1112, and authorities there cited.

been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required, on the trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give or the jury would have given, the verdict, such defect, imperfection, or omission, is cured by the verdict." "The expression *cured by verdict* signifies that the court will, after a verdict, presume or intend that the particular thing which appears to be defectively or imperfectly stated or omitted in the pleading, was duly proved at the trial." The rule applies only where a cause of action or ground of defense is defectively or inaccurately stated, and not where there is a total omission to state them. The general rule, at common law is, "that a verdict will aid a *defective statement* of title, but will never assist a statement of a *defective title*, or cause of action." ²⁰

§ 1115. **Motion in arrest of judgment.**—The only ground of arresting judgment is some cause *intrinsic*, appearing upon the face of the record, which would render it erroneous and reversible upon writ of error. It is immaterial upon what part of the record the error may arise, from the commencement of the suit to the verdict, if it be such as would require a reversal, the court is bound to arrest the judgment. A motion in arrest of judgment is in the nature of an assignment of errors upon the face of the record. Parties cannot move in arrest of judgment for any thing that is aided by verdict at common law, or amendable at common law, or by the statutes of amendments, or cured by the statutes of jeofails.²¹

§ 1116. **Motions for judgment non obstante veredicto, and repleader—Distinction.**—Where a plea confesses the action, and does not sufficiently avoid it, the common law rule is that

²⁰ 1 Chitty, Pl. (12th Am. ed.) 673-681; 2 Tidd's Prac. (1807) 826; Stephen, Pl. (Philadelphia ed. 1824) 165-167; 2 Saunder's Pl. & Ev. 1222-1223; 1 Saunder's Rep. 228-228d, and note where the authorities are collected.

²¹ 2 Tidd's Prac. (1807) 824; Stephen Pl. (Philadelphia ed. 1824) 117; Barriere v. Nairac, 2 Dall. 249 (1:368); Murphy v.

Stewart, 2 How. 226-284 (11:261); 3 Bl. Com. 393; Bond v. Dustin, 112 U. S. 604-609 (28:835); Carter v. Bennett, 15 How. 354-357 (14:727); Brown v. Massachusetts, 144 U. S. 573-580 (36:546); Van Stone v. Stilwell & Brice Mfg. Co., 142 U. S. 128-138 (35:961); Burrows v. Niblack (C. C. A.) 84 Fed. R. 112.

judgment shall be given on confession, without regard to a verdict for the defendant, which is called a judgment *non obstante veredicto*; and in such a case, a writ of inquiry will issue to assess the plaintiff's damages.

A verdict cannot aid an immaterial issue, which is defined to be: "Where that which is materially alleged by the pleadings is not traversed, but an issue is taken on such a point as will not determine the merits of the cause. Where the issue is immaterial, the court will award a repleader." At common law, a repleader was allowed before trial; but since the statute of jeofails, it is never allowed till after trial and not then unless it will be the means of effecting substantial justice between the parties. The distinction between a repleader, and a judgment *non obstante veredicto* is this: where the plea is good in form, though not in fact, that is, if it contain a defective title, or ground of defense, by which it is apparent to the court, upon the defendant's own showing, that in any way of putting it, he can have no merits, and the issue joined thereon be found for him, then, as the awarding of a repleader could not mend the case, the court will at once give judgment *non obstante veredicto*; but where the defect is not so much *in the title* as in the *manner of stating it*, and the issue joined thereon is immaterial, so that the court could not know for whom to give judgment, whether for the plaintiff or defendant, then in such case the court will award a repleader. A judgment *non obstante veredicto* is always upon the merits and never granted but in a very clear case; a *repleader* is always upon the manner and form of pleading.²²

§ 1117. **New trials—Authority of the federal courts to grant.** The seventeenth section of the judiciary act provides that, the circuit and district courts of the United States "shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."²³ This power is conferred, by the statute, pursuant to the seventh amendment to the federal constitution, (which was submitted contemporaneously with the adoption of the judiciary act), which declares that "no

²² 2 Tidd's Prac. (1807) 828-831; Stephen, Pl. (Philadelphia ed. 1824) 117-120; 1 Chitty, Pl. (12th Am. ed.) 655-656.

²³ U. S. Rev. Stat. sec. 726; 1 U. S. Stat. at L. ch. 20, sec. 17, pp. 73-79; 4 Fed. Stat. Anno. 549; U. S. Comp. Stat. 1901, p. 584.

fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," a motion for a new trial being one of the settled methods of the common law for the re-examination of facts determined by a jury.²⁴ The real source of the power is in the constitution, but is distributed and vested by the statute, which confers a valuable remedy upon litigants, and upon which the trial courts are required to exercise their discretion, and a failure to exercise it may be reviewed upon writ of error.²⁵

§ 1118. Same—Not controlled by rules of state procedure.—The act of conformity does not embrace motions for new trials in actions at law in the district and circuit courts of the United States, and state rules of procedure have no application to that remedy. Motions for new trials in the federal courts must be according to the course of the common law, and the rules of procedure of that system, as they have been announced and applied in the decisions of the supreme court of the United States. In regard to motions for new trials and bills of exception, those courts are independent of any statute, practice or procedure prevailing in the courts of the state where the trial is had.²⁶

§ 1119. Same—Same—When state law gives new trial in ejectment.—By the common law, the action of ejectment was a purely possessory action, and its determination decided nothing beyond the right of the plaintiff at the date of the demise, and successive actions might be brought upon an averment of other and different demises; and, therefore, in such cases one judgment was not a bar to another action for the same premises. Where a state, by statute, changes this common law rule, and makes a judgment in the action of ejectment conclusive upon the title, but gives the losing party at the first trial the absolute right to a new trial when applied for within a specified

²⁴ *Parsons v. Bedford*, 3 Pet. 433 (7:732); *Stephen, Pl.* (Philadelphia ed. 1824) 114-120.

²⁵ *Felton v. Spiro* (C. C. A.) 78 Fed. R. 576; *Mattox v. United States*, 146 U. S. 140-153 (36:917).

²⁶ U. S. Const. 7th Amndt.; *Missouri Pacific Ry. Co. v. Chicago & Alton R. Co.*, 132 U. S. 191-

192 (33:309); *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23:898); *Fishburn v. Chicago, Milwaukee & St. Paul Ry. Co.*, 137 U. S. (60-61 (34:585); *Newcomb v. Wood*, 97 U. S. 581-584 (24:1085); *Lowry v. Ry. Co.*, 68 Fed. R. 827.

time, and upon the payment of costs, without showing any grounds therefor, such right to a new trial is regarded as a valuable one, and the statute which authorizes it confers a substantial right, and one not dependent upon the discretion of the court; and the federal courts, sitting in the state, will enforce the right, not as a mere matter of procedure, but as a statutory rule giving additional security to the title to real property.²⁷

§ 1120. Same—It is a matter of right to make a motion for a new trial.—The party against whom the verdict of a jury is given in a federal circuit court is entitled, as a matter of right, to make and file a motion for a new trial, and to have it considered by the trial judge, to have him exercise his discretion upon it, and to determine it as to him shall seem just.²⁸ While the motion is addressed to the discretion of the court, it is a remedy secured by the constitution and laws to a party litigant for the correction by the trial court of injustice done by the verdict of a jury. It is one of the most important rights which a party to a jury trial can have. It is a right to invoke the discretion of the court to decide whether the injustice of the verdict is such that he ought to have an opportunity to take the case before another jury.²⁹ In the trial of causes, it often happens that in the hurry of the trial questions arise which the court is obliged to pass upon without that consideration which is desirable; and the policy of the law is always to provide ample means for a review or reconsideration of the questions which may arise in the course of a jury trial, and to reserve to the court a right, upon a reconsideration, to set aside the verdict and judgment, if the ends of justice and law seem to require it.³⁰ “Next to doing right, the great object in the administration of public justice should be to give public satisfaction. If the verdict be liable to many objections and doubts, in the opinion of the counsel, or even in the opinion of the bystanders, no party would go away satisfied unless he had a prospect of reviewing it. Such doubts would with him be de-

²⁷ *Small v. Mitchell*, 143 U. S. 99-110 (36:90); *Equator Mining & Smelting Co. v. Hall*, 106 U. S. 86 (27:114).

²⁸ *Mattox v. United States*, 146 U. S. 140-153 (36:917); *Kigman*

& Co. v. Western Manufacturing Co., 170 U. S. 675-681 (42:1192).

²⁹ *Felton v. Spiro* (C. C. A.) 78 Fed. R. 576.

³⁰ *Rutherford v. Penn. Mut. Life Ins. Co.*, 1 Fed. R. 456.

cisive; he would arraign the determination as manifestly unjust, and abhor a tribunal which he imagined had done him an injury without a possibility of redress."³¹

§ 1121. Same—Granting or refusing rests in discretion of the trial court.—It has long been the established law in the courts of the United States, that the granting or refusing to grant a new trial rests in the sound discretion of the court that tried the case, and to whom the motion is addressed, and that the ruling of the court upon the motion cannot be reviewed upon writ of error;³² but the refusal of the trial court to consider at all any substantial ground, set up by the party, for new trial may be assigned as error in the appellate court.³³

§ 1122. Same—When the motion for new trial must be filed. The motion for a new trial should be filed during the term at which the verdict is rendered; and, being seasonably filed and entertained by the court, it may be taken under advisement, and continued, and decided at a subsequent term of the court, and the time limited for the suing out of a writ of error does not begin to run until the motion is overruled.³⁴ Section eighteen of the judiciary act makes provision, where judgment has been entered on a verdict, or a finding of the court upon the facts, for a stay of execution for forty-two days, on motion for time to file a petition for a new trial, and if such petition should be filed by leave within the time, execution is to be further stayed as of course, and if a new trial be granted, the former judgment shall be thereby rendered void.³⁵ This section provides for a case where the applicant desires to obtain an order of the court for an extension of time within which to reduce his application for a new trial to form, and to state the

³¹ 3 Bl. Com. 391.

³² *Newcomb v. Wood*, 97 U. S. 581-584 (24:1085); *Fishburn v. Chicago, Milwaukee & St. Louis Ry. Co.*, 137 U. S. 60-61 (34:585); *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23:898); *Missouri Pacific Ry. Co. v. Chicago & Alton R. Co.*, 132 U. S. 191-192 (33:309); *Schuhardt v. Allen*, 1 Wall. 359-371 (17:642); *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Heck*, 102 U. S. 120 (26:58);

Jones v. Buckell, 104 U. S. 554-556 (26:841); *Home Ins. Co. v. Barton*, 13 Wall. 603-604 (20:708).

³³ *Felton v. Spiro* (C. C. A.) 78 Fed. R. 576; *Mattox v. United States*, 146 U. S. 140-153 (36:917).

³⁴ *Kigman & Co. v. Western Manufacturing Co.*, 170 U. S. 675-681 (42:1192).

³⁵ U. S. Rev. Stat. sec. 987; 1 U. S. Stat. at L. ch. 20, sec. 18, pp. 73-79; 3 Fed. Stat. Anno. 46; U. S. Comp. Stat. 1901, p. 708.

causes, and for a stay of execution pending the motion, and does not contravene the rule that the application must be made during the term at which the verdict is rendered; for the application for an extension of time is, itself the inception of the proceeding to have the verdict set aside.⁸⁶ It is a general rule that after the expiration of the term, all final judgments, decrees or other final orders of the court thereat rendered and entered of record, pass beyond its control, unless steps be taken during that term by motion or otherwise, to set aside, modify, or correct them.⁸⁷

§ 1123. **Same—Reasons for granting new trial.**—The statute authorizes the courts of the United States to grant new trials “for reasons for which new trials have usually been granted in the courts of law.” This provision has received a liberal construction. At the time of the passage of the original judiciary act, reasons or causes for which new trials were usually granted in courts of law were “wholly *extrinsic*, arising from matter foreign to, or *dehors* the record.” These were usually (1) want of notice of trial, (2) irregularity in selecting or impaneling the jury, (3) improper conduct of the jury, (4) improper conduct of the prevailing party, his agents or counsel, toward the jury, (5) improper admission or exclusion of evidence, (6) misdirection by the judge of the jury, (7) the finding of excessive damages, (8) that the verdict is contrary to the evidence, (9) that the verdict is contrary to the law, (10) imperfection of the verdict by reason of some uncertainty or ambiguity, or by finding less than the whole matter put in issue, or by not assessing damages, (11) surprise, accident, inadvertence or mistake, (12) newly discovered evidence, and perhaps other reasons of a similar character.⁸⁸

§ 1124. **The judgment—Controlled by state laws.**—The judgment is the conclusion or sentence of the law upon the facts found by the verdict of the jury, or admitted by the parties, or upon their default in the course of the suit. At common law, in the actions of assumpsit, covenant, case, replevin, and trespass, the judgment for the plaintiff was, that

⁸⁶ *Rutherford v. Penn Mut. Life Ins. Co.*, 1 Fed. R. 456; *Felton v. Spiro* (C. C. A.) 78 Fed. R. 579. 681 (42:1192); *Heckman v. Fort Scott*, 141 U. S. 415-419 (35:775). ⁸⁸ 3 Bl. Com. 389; 2 Tidd's Prac.

⁸⁷ *Kigman & Co. v. Western Manufacturing Co.*, 170 U. S. 675- (1087) 830-832; *Stephen*, Pl. (Philadelphia ed. 1824) 115-116.

he recover his damages and costs against the defendant; and, if the action was against an executor or administrator, to be levied of the goods of the testator or intestate, in the hands of the defendant, if he had so much thereof to be administered, if not, then the costs to be levied *de bonis propriis*. In the action of debt, the judgment for the plaintiff was, that he recover his debt, together with his damages and costs; and, if the action was against an executor or administrator, to be levied of the goods of the testator or intestate, in the hands of the defendant, if he had so much thereof to be administered, if not, then the costs to be levied *de bonis propriis*. In an action of annuity, the judgment was for the plaintiff to recover the annuity, and arrearages of the same, as well before the bringing of the action as afterwards, up to the time when judgment was given. In the action of detinue, the judgment for the plaintiff was that he recover the goods, or their value, with damages and costs. In replevin, the judgment for defendant, at common law, was to have a return of the goods; and in other actions, the judgment for the defendant was, that plaintiff take nothing by his writ, and that defendant recover his costs only. In real and mixed actions, the judgment for the plaintiff was, that he recover the seisin or possession of the premises.³⁹

In actions at law, in the circuit courts of the United States, by virtue of the act of conformity, judgments, both as to form and substance, and the parties for whom, and against whom they may be rendered, are controlled by the laws of the states in which the courts are respectively held and the actions are tried. Such state statutes furnish a rule of practice for the courts of the United States.⁴⁰

§ 1125. Same—Lien of judgments of the United States courts.—Judgments and decrees rendered in a circuit or district court of the United States within a state, are liens on the property of the debtor throughout the state in the same manner, and to the same extent, and under the same conditions only, as if rendered by a court of general jurisdiction of such

³⁹ 2 Tidd's Prac. (1807) 841-842; 291 (23:926); Bond v. Dustin, 112 Stephen, Pl. (Philadelphia ed. U. S. 604-609 (28:835); Santa Anna v. Frank, 113 U. S. 339-340 (28:978); Hopkins v. Orr, 124 U. S. 510-515 (31:523).
1824) 126-132; 3 Bl. Com. 395-396, 412.

⁴⁰ Sawin v. Kenny, 93 U. S. 289-

state; but in order to fix the lien, when the laws of the state require the judgments and decrees of the state court to be registered, recorded, docketed, or indexed, such state laws must authorize the judgments and decrees of the federal courts to be dealt with in the same manner.⁴¹ But it is not necessary to fix a lien of such federal court judgments in the county or parish wherein rendered, if the clerk of such court be required by law to have a permanent office and a judgment record open at all times for public inspection in such county or parish.⁴² And judgments and decrees rendered in a circuit or district court, within a state, shall cease to be liens on real estate or chattels real, in the same manner and at like periods as judgments and decrees of the courts of such state cease, by law, to be liens thereon.⁴³

§ 1126. **Same—Federal court clerks to keep index of judgments.**—It is provided by statute, “that the clerks of the several courts of the United States shall prepare and keep in their respective offices complete and convenient indices and cross-indices of the judgment records of said courts, and such indices of such records shall at all times be open to the inspection and examination of the public.”⁴⁴

§ 1127. **Execution—State remedies in force on December 1, A. D. 1873—State remedies subsequently adopted by federal courts.**—Any party recovering a judgment in an action at law in any circuit or district court of the United States, is entitled to similar remedies upon the same, by execution or otherwise, to reach the property of the debtor, as are provided in like causes by the laws of the state in which such court is held, as such state laws existed on Dec. 1, A. D., 1873, the date upon which the United States revised statutes took effect; or the remedies provided by the law of the state enacted since said date, and adopted by general rules of said courts.⁴⁵

⁴¹ 25 U. S. Stat. at L. ch. 729, sec. 2, p. 357; 4 Fed. Stat. Anno. 5-6.
⁴² 28 U. S. Stat. at L. ch. 180, sec. 3, p. 814; 4 Fed. Stat. Anno. 8.
⁴³ U. S. Rev. Stat. sec. 967; 4 Fed. Stat. Anno. 4.

⁴⁴ 25 U. S. Stat. at L. ch. 729, sec. 1, p. 357; 4 Fed. Stat. Anno. 5.
⁴⁵ U. S. Rev. Stat. 916; 3 Fed. Stat. Anno. 44; 4 Fed. Stat. Anno. 580; U. S. Comp. Stat. 1901, p. 684; *Lamaster v. Keeler*, 123 U. S. 376-391 (31:238); *Cook v. Avery*, 147 U. S. 375-386 (37:209); Ante-secs. 942, 943.

§ 1128. Same—Executions to run in all districts of a state.— It is provided by statute that: "All writs of execution upon judgments or decrees obtained in a circuit or district court, in any state which is divided into two or more districts, may run and be executed in any part of such state; but shall be issued from, and made returnable to, the court wherein the judgment was obtained."⁴⁶

(b) TRIAL BY THE COURT WITHOUT THE INTERVENTION OF A JURY.

§ 1129. Procedure in trials by the court.—The entire scheme of judicial procedure established by law, for the trial of issues of fact by the court, without the intervention of a jury, in civil actions at law in the circuit courts of the United States, and for a review upon writ of error of the rulings of the court in such trials, is embraced in two short sections of the United States revised statutes, which constitute the whole of the federal statutory law upon the subject; and we must look alone to those statutory provisions, and the decisions of the federal courts construing and applying them, for the rules of procedure in such trials, and the review of final judgments rendered in them upon writ of error.⁴⁷ Those sections read as follows:

"Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The

⁴⁶ U. S. Rev. Stat. sec. 985; 3 Fed. Stat. Anno. 44; U. S. Comp. Stat. 1901, p 707; 4 U. S. Stat. at L. ch. 124, p. 184.

⁴⁷ *Swift & Co. v. Jones* (C. C. A.) 145 Fed. R. 489. In this case, Waddill, District Judge, delivering the opinion of the court, said: "Such sections constitute within themselves a perfect and complete system for the guide and government of the federal courts, and ought not to be departed from. Nothing is better settled than that, whenever congress has legislated upon any matter of practice, and

prescribed a definite rule for the government of its own courts, it is, to that extent exclusive of the legislation of the state upon the same matter. * * * It is the duty of the trial courts to adhere rigidly to these enactments of congress, prescribed for their government, and the presumptions are all unfavorable to the waiver of the right of trial by jury; and whenever cases are submitted to them for trial without a jury, it must plainly appear that the waiver was made as prescribed by the act of congress."

finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.”⁴⁸

“When an issue of fact in any civil cause in a circuit court is tried and determined by the court, without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error, or upon an appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment.”⁴⁹

§ 1130. **Same—Analysis of the procedure.**—An examination of the sections of the law just quoted show that they prescribe the following rules for the trial of actions at law, in the circuit courts, by the court, without the intervention of a jury, namely: (1) As a condition precedent to the power of the court to try the issues of fact, the parties, or their attorneys of record, must file with the clerk of the court where the cause is pending a stipulation in writing waiving a jury; (2) the finding of the court upon the facts may be either general or special; (3) if the finding of the court upon the facts be general, it shall have the same effect as a general verdict of a jury at common law; (4) if the finding of the court upon the facts be special, it shall have the same effect as a special verdict of a jury at common law; (5) the finding of the court upon the facts, whether general or special, settles all questions of fact passed upon, and is conclusive, and the finding cannot be re-examined upon writ of error, any more than the facts found by a jury; (6) the rulings of the court made in the progress of the trial of the cause may be reviewed by the supreme court upon writ of error; (7) in order to secure a review upon writ of error of the rulings made by the court upon the trial, such rulings must be excepted to at the time they are made, and duly presented by a bill of exceptions; and (8) when the finding of the court upon the facts is special, the review in the appellate court may extend to the determination of the sufficiency of the facts found to support the judgment.⁵⁰

⁴⁸ U. S. Rev. Stat. sec. 649; 4 Fed. Stat. Anno. 450; U. S. Comp. Fed. Stat. Anno. 393; U. S. Comp. Stat. 1901, p. 570.
Stat. 1901, p. 525.

⁵⁰ Norris v. Jackson, 9 Wall.

125-129 (19:608); Lehnert v. Dick-

§ 1131. **The stipulation waiving a jury.**—The foundation of the whole proceeding of a trial by the court, in actions at law, under the act of congress, is the written stipulation waiving a jury, and submitting the issues of fact, as well as of law, to the court; and it should be made and filed in full compliance with the directions of the statute, before the commencement of the trial. Before the passage of the federal statute, it had been settled by repeated decisions, that in any action at law in which the parties waived a trial by a jury, and submitted the facts to the determination of the court upon the evidence, its judgment was valid; but the supreme court had no authority to revise the rulings of the trial court upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, and, therefore, when no error appeared upon the record, it was compelled to affirm the judgment. The reason for this rule was, that, by the established and familiar rules and principles which govern common law proceedings, no question of law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, or execution, in the cause), unless the facts are found by a jury, by a general or a special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts and referring the questions of law to the court. Even in actions duly referred by rule of court to an arbitrator, only rulings and decisions in matter of law after the return of the award were reviewable upon writ of error.

And since the passage of the act of congress, authorizing a trial by the court upon a written stipulation waiving a jury, and

son, 148 U. S. 71-80 (37:373); *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92-107 (37:380); *Dirst v. Morris*, 14 Wall. 484-491 (20:722); *Mercantile Ins. Co. v. Folsom*, 18 Wall. 237-254 (21:827); *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. 285-304 (20:398); *Coddington v. Richardson*, 10 Wall. 516-518 (19:981); *Cooper v. Omohundro*, 19 Wall. 65-70 (22:47); *Tyng v. Grinnell*, 92 U. S. 467-473 (23:733); *Martinton v.*

Fairbanks, 112 U. S. 670-676 (28:862); *Stanley v. Board of Supervisors of the County of Albany*, 121 U. S. 535-552 (30:1000); *Doolley v. Pease* (C. C. A.) 88 Fed. R. 446; *Bank v. Bellville*, 27 C. C. A. 647; *Smiley v. Barker*, 28 C. C. A. 9; *Hathaway v. First National Bank of Cambridge*, 134 U. S. 494-499 (33:1004); *St. Louis v. Rutz*, 138 U. S. 226-251 (34:941); *Runkle v. Burnham*, 153 U. S. 216-228 (38:694).

providing for a review upon writ of error of the rulings of the court in the progress of the trial, it has been equally well settled by a series of decisions of the supreme court, that the appellate court cannot review and re-examine the rulings at the trial of an action by the circuit court, without a jury, unless the record shows, affirmatively, such a waiver of a jury as the statute requires, by stipulation in writing signed by the parties or their attorneys, and filed with the clerk of the court. The most appropriate evidence of a compliance with the statute, is a duly authenticated copy of the written stipulation filed with the clerk; but the existence of the condition upon which the review is allowed is sufficiently shown by a statement in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing and filed with the clerk. And since the act of congress, as before, a judgment upon an agreed statement of facts, signed by the parties or their counsel, and entered of record, leaving no question of fact to be tried, and presenting nothing but questions of law, may be reviewed upon writ of error. Such an agreed statement of facts, spread at large upon the record, has always been held to be equivalent to a special verdict, and to present questions of law alone for the consideration of the court, and a judgment upon it could be reviewed upon writ of error, and it was not intended by the federal statute here under consideration to interfere with this practice, but the evident object of that legislation was to give special findings by the court the same effect, for the purposes of a writ of error, as a special verdict or an agreed case. Indeed, an agreed statement of facts, or case stated, signed by the parties or their counsel, and entered of record, is of itself a sufficient waiver to meet the requirements of the statute.⁵¹

§ 1132. What questions of law may be raised on the trial and reviewed on writ of error.—There has been some contrariety of opinion in the judicial decisions, as to what extent the rulings of the court upon a trial in an action at law, by the court, without the intervention of a jury, may be reviewed and re-ex-

⁵¹ *Bond v. Dustin*, 112 U. S. 604–609 (28:835); *Supervisors v. Ken-
nicott*, 103 U. S. 554–558 (26:486); *Madison v. Warren*, 106 U. S. 622–
623 (27:311); *Spalding v. Manas-* see, 131 U. S. 65–66 (33:86); *Dundee Mortgage & Trust Invest-
ment Co. v. Hughes*, 124 U. S. 157–
160 (31:357).

amined upon writ of error. There is no dissent from the proposition that the rulings of the court upon the admission or rejection of evidence may be so reviewed, when the exception is reserved at the time the ruling is made, and the ruling duly presented by bill of exceptions; but some of the cases hold that this is the full extent of the power of revision and re-examination upon writ of error.⁵² It seems, however, to be now settled, by the better reasoning, and the weight of authority, and especially by the later decisions of the supreme court, that, upon a trial without a jury, all the legal questions may be raised and reserved in the trial court, and be reviewed and re-examined upon writ of error, which could be so raised and reserved and reviewed if the case were tried by a jury. The form is sometimes different, but the substance is always the same. The federal statute provides that "the finding of the court shall be general or special;" this is a perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. It is also provided by the statute that the finding "shall have the same effect as the verdict of a jury;" and that "the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal." This provision for a review of rulings in the progress of the cause is in exact analogy to the familiar and long established law and practice, as to the review of rulings upon jury trials, and was no doubt in the mind of the national legislature at the time it passed the act. The statute contains no limitation upon the right to, and power of revision and review of the rulings of the court in the progress of the trial; it does not, either in terms or by implication, limit the review to rulings upon the admission and rejection of evidence; there is nothing in the nature of the subject which requires any such limitation. There seems to be no reason why the parties should not be permitted to move the court to "declare the law" of the case, object to his ruling, reserve exceptions, present the ruling by bill of exceptions, and

⁵² *Dirst v. Morris*, 14 Wall. 484-491 (20:722); *Mercantile Ins. Co. v. Folsom*, 18 Wall. 237-254 (21:827); *Cooper v. Onohunduro*, 19 Wall. 65-70 (22:47); *Searcy County v. Thompson*, (C. C. A.) 66 Fed. 92; *City of Key West v. Baer*, (C. C. A.) 66 Fed. R. 440.

obtain a review and re-examination upon writ of error. This seems to be the meaning of the earlier and later decisions.⁵³

§ 1133. **Same—Obiter dictum of Mr. Justice Bradley.**—In a case calling for no expression of opinion upon the subject, Mr. Justice Bradley, discussing the power of the supreme court to review and re-examine the “rulings of the court in the progress of the trial,” where a jury is waived under the statute, said:

“Had there been a jury, the defendant might have called upon the court for instructions, and thus raised the questions of law which he deemed material. Or, had the law which authorizes the waiver of a jury allowed the parties to require a special finding of the facts, then the legal questions could have been raised and presented here upon the findings as upon a special verdict. But, as the law stands, if a jury is waived, and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of testimony.”⁵⁴

This *obiter dictum* is the origin and foundation of the doctrine, that the power and right of review and re-examination extends, in such cases, only to rulings upon the admission and rejection of evidence,⁵⁵ and is inconsistent with both the prior⁵⁶ and subsequent⁵⁷ declarations and practice of the supreme court.

§ 1134. **Same—The practice and procedure stated by Mr. Justice Miller.**—In an early case, Mr. Justice Miller of the supreme court, upon careful consideration, stated the appropriate

⁵³ *Norris v. Jackson*, 9 Wall. 125-129 (19:608); *Lehnen v. Dickson*, 148 U. S. 71-80 (37:373); *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92-107 (37:380); *Runkle v. Burnham*, 153 U. S. 216-228 (38:694); *Hathaway v. First National Bank of Cambridge*, 134 U. S. 494-499 (33:1004); *Clement v. Ins. Co.*, 7 Blatchf. 51, Fed. Cas. No. 2,882; *Ins. Co. v. Tweed*, 7 Wall. 44-53 (19:65).

⁵⁴ *Dirst v. Morris*, 14 Wall. 484-491 (20:722).

⁵⁵ *Mercantile Ins. Co. v. Folsom*, 18 Wall. 237-254 (21:827); *Cooper*

v. Omohundro, 19 Wall. 65-70 (22:47); *Searcy County v. Thompson* (C. C. A.) 66 Fed. 92 (and see especially the dissenting opinion of Sanborn, Circuit Judge); *City of Key West v. Baer* (C. C. A.) 66 Fed. R. 440.

⁵⁶ *Norris v. Jackson*, 9 Wall. 125-129 (19:608).

⁵⁷ *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92-107 (37:380); *Runkle v. Burnham*, 153 U. S. 216-228 (38:694); *Hathaway v. First National Bank of Cambridge*, 134 U. S. 494-499 (33:1004).

practice and procedure in actions at law, tried by the court without a jury, under the federal statute as follows:

“1. If the verdict be a general verdict, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by bill of exceptions, or as may arise on the pleadings.

“2. In such cases, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury.

“3. That if the parties desire a review of the law involved in the case, they must either get the court to find a special verdict, which raises the legal propositions or they must present to the court their propositions of law, and require the court to rule on them.

“4. That objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.”⁵⁸

In a case of comparatively recent date, the supreme court reiterated the above propositions *in totidem verbis*, and declared that they “have been persistently adhered to by” that court;⁵⁹ and in a more recent case they were distinctly approved and relied on as an authoritative declaration of the law upon the subject.⁶⁰

§ 1135—Requisites of a special finding by the court.—In actions at law in the federal and circuit courts, tried under the statute without the intervention of a jury, the special finding of the court, authorized by law, is not a mere report of the evidence in the case, but is a statement of the ultimate facts on which the law of the case must determine the rights of the parties; it is a finding of the propositions of fact which the evidence establishes, and not the evidence on which those ultimate facts are supposed to rest. The finding must be sufficient in itself, without inferences, or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by the appellate court, but must have all the sufficiency, fullness, and

⁵⁸ *Norris v. Jackson*, 9 Wall. 125-129 (19:608).

⁶⁰ *City of St. Louis v. Western Union Telegraph Co.*, 148 U. S. 92-

⁵⁹ *Martinton v. Fairbanks*, 112 U. S. 670-676 (28:862).

107 (37:380).

perspecuity of a special verdict. If it requires the appellate court to weigh conflicting testimony, or to balance admitted facts, and then to deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a finding as the appellate court can act upon, for the determination of the sufficiency of the facts found to support the judgment. Special findings under the statute were intended by congress as a proper substitute for the special verdict of a jury; and it is a well settled rule, both at common law, and in federal jurisprudence, that it is of the very essence of a special verdict, that the jury shall find the ultimate facts on which the court is to pronounce judgment, according to law; and, in order to enable an appellate court to act upon a special verdict, the jury must find the facts, and not merely state the evidence of facts; and the rule is, that when the jury states the evidence merely, without stating their conclusion of fact, a court of error cannot act upon their finding.⁶¹

§ 1136. **The special finding should be “spread at large upon the record.”**—It is perfectly clear from the federal statute and the decisions of the supreme court that, in cases tried by the court without the intervention of a jury, it was the intention of congress, in the passage of the statute, the special finding of the court shall have the effect, and perform the functions and office of a special verdict of a jury at common law. One of the offices of a special verdict, according to that system of procedure is, to enable the appellate court to review and re-examine, upon writ of error, *without a bill of exceptions*, the rulings of the trial court upon matters of law; and, in order to accomplish that purpose, it is necessary that the special verdict should be “spread at large upon the record as a part thereof,” and such has always been the rule, in the common law courts of England and in the federal courts. A special verdict of a jury is a part of the record in the cause, without a bill of exceptions; it is, like a demurrer to the evidence, entered in full upon the record of the proceedings of the court, and upon writ of error the appellate court determines from an inspection of it whether

⁶¹ *Norris v. Jackson*, 9 Wall. 125-129 (19:608); *Tyng v. Grinnell*, 92 U. S. 467-473 (23:733); *Burr v. Des Moines Co.*, 1 Wall. 99-103 (17:561); *Brooklyn Life Ins. Co. v. Miller*, 12 Wall. 285-304 (20:398); *Anglo-American Land, Mortgage & Agency Co. Limited v. Lombard*, (C. C. A.) 132 Fed. R. 721.

or not the facts found are sufficient to support the judgment. The same rule applies to a special finding of the court; it needs no bill of exceptions to make it a part of the record; it should be entered as a part of the record proper.⁶²

§ 1137. **Nonsuit upon the trial.**—Nonsuit at common law was a dismissal of plaintiff's action, without an adjudication, except as to costs, and the judgment was no bar to another action for the same cause. Judgment of nonsuit passed against the plaintiff when, on trial by jury, the plaintiff, on being called, at the instance of the defendant, to be present in court while the jury gave their verdict, failed to make his appearance. In such case, no verdict was given, but judgment of nonsuit was entered against the plaintiff. By the ancient common law, it was usual to call or demand the plaintiff before the jury gave their verdict, in order to answer the amercement, to which by the old law he was liable in case he failed in his suit, as a punishment for his false claim; and it was usual for the plaintiff, when his counsel perceived that the evidence adduced on the trial was insufficient to entitle him to a verdict, to fail to appear and thus suffer a voluntary nonsuit. At a later stage in the development of the common law, a motion by defendant for nonsuit was usual whenever plaintiff had failed to make out a case by the evidence. Judgment of nonsuit was also entered against the plaintiff at common law, when, after issue joined, he neglected to bring the case on to be tried in due time, as limited by the course and practice of the court. A nonsuit could only be at the instance of the defendant; and in an action against several defendants, the plaintiff must have been nonsuited as to all, or none of them. He was, at the common law, in no case compellable to be nonsuited; and, therefore, if he insisted upon the case being left to the jury, they gave their verdict, and judgment was entered upon it.⁶³

In the federal courts, it is held, that the difference between

⁶² *Norris v. Jackson*, 9 Wall. 125-129 (19:608); *Tyng v. Grinnell*, 92 U. S. 467-473 (23:733); *Burr v. Des Moines Co.*, 1 Wall. 99-103 (17:561); *United States v. Eliason*, 16 Pet. 291-302 (10:968); *United States v. King*, 7 How. 833-894 (12:934); *Craig v. Missouri*, 4 Pet. 410-465 (7:903); *Suydam v. Williamson*, 20 How. 427-442 (15:978); ante secs. 1103-1107.

⁶³ 2 Tidd's Prac. (1807) 796-798; *Stephen*, Pl. (Philadelphia ed. 1824) 131; 3 Bl. Com. 376-377.

a motion to order a judgment of nonsuit against the plaintiff, and a motion to direct a verdict for the defendant is "rather a matter of form than of substance." ⁶⁴

⁶⁴ *Oscanyon v. Winchester Repeating Arms Co.*, 103 U. S. 261-278 (26:539); *Coughran v. Bigelow*, 164 U. S. 301-311 (41:442); *Runkle v. Burnham*, 153 U. S. 216-228 (38:694); *Union Pacific Ry. Co. v. Snyder*, 152 U. S. 684-691 (38:597); *Columbia & Puget Sound R. Co. v. Hawthorne*, 144 U. S. 202-208 (36:405).

CHAPTER XXX.

BILLS OF EXCEPTIONS TAKEN TO THE DECISIONS AND RULINGS OF THE COURT UPON THE TRIAL OF SUITS AT COMMON LAW IN THE CIRCUIT COURTS OF THE UNITED STATES.

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| <p>§ 1138. Bills of exceptions defined.</p> <p>1139. Preparing the cause for review upon writ of error.</p> <p>1140. Rulings upon the trial must be excepted to at the time they are made.</p> <p>1141. Errors apparent upon the record, not requiring a bill of exceptions.</p> <p>1142. Bills of exceptions to the admission of evidence.</p> <p>1143. Bills of exception to the exclusion of evidence.</p> <p>1144. Exceptions to the ruling of the court in giving and refusing instructions to the jury—When taken.</p> <p>1145. Exceptions to the court's charge must be specific—Counsel must except "Distinctly and Severally."</p> <p>1146. Requested charges—When the general charge of the court covers the entire case.</p> | <p>§ 1147. Same—A series of instructions presented as one request.</p> <p>1148. Same—Exception to the portion of the court's charge which is variant from requested charge.</p> <p>1149. Bills of exception taken to the rulings of the court in giving and refusing instructions—What to contain.</p> <p>1150. Same — Same — Supreme court rule.</p> <p>1151. Same—How much of the evidence should be set out in bill of exceptions—General rule.</p> <p>1152. Authentication of bills of exceptions.</p> <p>1153. Mandamus to compel the trial judge to settle and sign a bill of exceptions.</p> <p>1154. Order giving time to prepare a bill of exceptions.</p> |
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§ 1138. **Bill of exceptions defined.**—A bill of exceptions is a statement in writing of an exception of a party, to a decision or ruling, made, over his objection, by the court during the progress of the trial, upon a point or question of law, such as the competency of a witness, the admissibility of evidence or

the effect of it, or the directions of the court to the jury, as to the law of the case, tendered by the party excepting, and allowed and signed by the trial judge, and filed in the cause, and thereby made a part of the record pursuant to law, with the view, and for the purpose of obtaining a review and revision of such decision or ruling by an appellate court upon writ of error.¹ Where the alleged error does not appear upon the face of the record, a bill of exceptions to the ruling of the court upon questions of law, as either in admitting or rejecting testimony, or in its instructions to the jury, constitutes the only mode of bringing the point before an appellate court for review.² The office of a bill of exceptions is to make matter of record what would not otherwise appear as such, and no bill is necessary where the error alleged is apparent upon the record.³

§ 1139. Preparing the cause for review upon writ of error.—The chapter next preceding contains a statement of the procedure upon the trial; in this one, an effort is made to state the rules to be observed in preparing the cause for review upon writ of error, for the purpose of correcting any errors committed by the trial court. The final judgments in all civil actions at law tried in the district and circuit courts of the United States may be reviewed, re-examined, revised, and reversed, modified or affirmed, upon writ of error, either by the federal supreme court, or by the United States circuit court of appeals, without regard to the sum or value in dispute;⁴ but, in order to invoke the jurisdiction of the court of errors, and obtain the review, the decisions and rulings of the trial court complained of by the plaintiff in error must be duly excepted to by him, and, together with the exception, preserved in the record. The errors relied upon for a reversal of the cause must be alleged and shown upon the record made in the lower court, and must appear upon the face of the authenticated

¹ 2 Tidd's Prac. (1807) 786-791; Stephen, Pl. (Philadelphia ed. 1824) 110-111; 3 Bl. Com. 372; Pomeroy v. Bank, 1 Wall. 592-604 (17:638); Zeller v. Eckert, 4 How. 289-298 (11:979).

² Graham v. Bayne, 18 How. 60-63 (15:265).

³ Young v. Martin, 8 Wall. 354-358 (19:418).

⁴ 26 U. S. Stat. at L. ch. 517, secs. 5 and 6, p. 826; 4 Fed. Stat. Anno. pp. 398-399, 409; The Paquete Habana, 175 U. S. 677-721 (44:320).

transcript thereof annexed to and returned with the writ of error.⁵

Inasmuch as the more numerous and serious errors committed in the lower court occur upon the trial, the counsel, while actually engaged in the trial, is required to so direct the proceeding and conduct the cause as to prepare it for review upon writ of error. Indeed, the most important features of the preparation for review are settled and determined in the hurry of the trial.⁶ The two run *pari passu*; and the adjudicated cases show that the most able and skillful counsel frequently overlook, upon the trial, and thereby waive, grave errors in the rulings of the court, which, if made to appear upon the record of the trial, would work a reversal of the cause. The preparation of the cause for review is not controlled by the procedure of the courts of the state where the trial is had, but by the rules of the common law, federal statutes, decisions, and rules prescribed by the supreme court;⁷ and the natural mental tendency of counsel to observe state rules of procedure in trials in the federal courts is often the cause of the failure to duly reserve exceptions to the rulings and decisions of the court upon the trial.⁸

§ 1140. Rulings upon the trial must be excepted to at the time they are made.—By the uniform course of the decisions of the supreme court, from the organization of the federal judiciary down to the present time, no exceptions to the rulings and decisions of the district and circuit courts made during the progress of the trial of an action at law can be considered or reviewed, or re-examined, or revised upon writ of error, by the supreme court or circuit courts of appeals, unless such exceptions are taken at the trial, and before the jury retire from the bar, and are, together with the rulings excepted to

⁵ *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36:162); *Hutchins v. King*, 1 Wall. 53-60 (17:544); *United States v. McMaster*, 4 Wall. 680-684 (18:311); *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Heck*, 102 U. S. 120 (26:58).

⁶ *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36:162).

⁷ *Ex parte Chateaugay Ore &*

Iron Co., 128 U. S. 544-557 (32:508); *St. Clair v. United States*, 154 U. S. 134-155 (38:936); *Lincoln v. Power*, 151 U. S. 436-443 (38:224); *Francisco v. Chicago & A. R. Co.*, 79 C. C. A. 292-298; *Boogher v. Life Ins. Co.*, 103 U. S. 90-98 (26:310); ante sec. 945.

⁸ *Brown v. Clark*, 4 How. 4-15 (11:850); *Flanders v. Tweed*, 9 Wall. 425-432 (19:678).

embodied in a formal bill of exceptions, tendered by the party excepting, to the trial judge, and allowed and authenticated by him, during the same term at which the trial is had, or within a further time allowed by order entered at that term, or by standing rule of court, or by consent of parties; and, except under very extraordinary circumstances, the bills of exception must be allowed and authenticated by the trial judge, and filed with the clerk, during the same term at which the trial is had. After the term has expired, without the court's control over the case being reserved by standing rule or special order, and especially after a writ of error to review the judgment in the cause has been returned and entered in the appellate court, all authority of the court below to allow a bill of exceptions then first presented, or to alter or amend a bill of exceptions already allowed and filed, is at an end. To authorize any objection to the admission or exclusion of evidence, or to the giving or refusal of any instructions to the jury, to be heard by the appellate court, the record must disclose, not merely the fact that the objection was taken in the court below, but that the parties excepted at the time to the action of the court thereon. The power of the appellate court is confined to exceptions actually taken at the trial. It is not sufficient that the bill of exceptions should show, merely, that an objection was made at the trial; but it must also show that the court overruled the objection, and that the party then and there duly excepted to the ruling of the court upon the objection. And the duty of seasonably drawing up and tendering a bill of exceptions, stating distinctly the rulings complained of and the exceptions taken to them, devolves upon the excepting party, and his counsel, and not upon the court; the trial court has only to consider whether the bill tendered by the party is in due time, in legal form, and conformable to the truth; and the power and duty of the appellate court is limited to determining the validity of the exceptions duly reserved at the trial, and preserved and stated in the bill of exceptions tendered, and allowed and authenticated in the manner required by law. Any fault or omission in framing a bill of exceptions, or in tendering it to the court, being the act of the party and not of the court, cannot be amended at a subsequent term.⁹

⁹ *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36: 20 How. 252-255 (15:900)); *United States v. Breittling*, 162); *Phelps*

§ 1141. **Errors apparent upon the record, not requiring a bill of exceptions.**—With respect to the manner in which they may be made to appear and be presented, errors in the rulings and decisions of the circuit and district courts, in actions at law, are of two classes, namely: (1) Errors which are apparent upon the face of the record proper, and require no bill of exceptions to preserve and present them; and (2) errors in rulings and decisions upon the trial, which *rest in parol* when made, and must be challenged at the time, and preserved and presented by bill of exceptions. In the first class are embraced the following: (1) errors arising upon the process; (2) errors arising upon the pleadings; (3) errors arising upon the judgment; (4) errors arising upon a demurrer to the evidence; (5) errors arising upon a special verdict or special finding of the court upon a trial without the intervention of a jury; (6) errors arising upon a “special case;” and (7) errors arising upon an “agreed case.” Errors of the sixth and seventh subdivisions were not allowed as a basis of review upon writ of error by the procedure of the English common law; but the federal courts have extended the common law rule to embrace them, and the list here stated may be reviewed without a bill of exceptions.¹⁰

v. Mayer, 15 How. 160–161 (14:643); *Turner v. Yates*, 16 How. 14–29 (14:824); *Barton v. Forsyth*, 20 How. 532–534 (15:1012); *Poof v. Fluger*, 11 Pet. 185–212 (9:680); *Bradstreet v. Thomas*, 4 Pet. 102–107 (7:796); *Brown v. Clark*, 4 How. 4–15 (11:850); *Walton v. United States*, 9 Wheat. 651–658 (6:182); *Muller v. Ehlers*, 91 U. S. 249–251 (23:319); *Generes v. Bonnemer*, 7 Wall. 564–565 (19:227); *Flanders v. Tweed*, 9 Wall. 425–432 (19:678); *Jones v. Grover & Baker Sewing-machine Co.*, 97 U. S. 303 (24:925); *Hunnicut v. Peyton*, 102 U. S. 333–369 (26:113); *Davis v. Patrick*, 122 U. S. 138–154 (30:1090); *Ex parte Chateaugay Ore & Iron Co.*, 128 U. S. 544–557 (32:508); *Hutchins v.*

King, 1 Wall. 53–60 (17:544); *United States v. McMaster*, 4 Wall. 680–684 (18:311); *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Heck*, 102 U. S. 120 (26:58); *Zeller v. Eckert*, 4 How. 289–298 (11:979); *Dredge v. Forsyth*, 2 Black, 563–571 (17:253); *Young v. Martin*, 8 Wall. 354–358 (19:418); *Hanna v. Maas*, 122 U. S. 24–27 (30:1117); *Stimpson v. Westchester R. Co.*, 3 How. 353–356 (11:722).

¹⁰ *Campbell v. Bayreau*, 21 How. 223–228 (16:96); *Suydam v. Williamson*, 20 How. 427–442 (15:978); *Mumford v. Wardell*, 6 Wall. 423–439 (18:756); *Faw v. Roberdeau*, 3 Cranch, 172–178 (2:402); *Brent v. Chapman*, 5 Cranch, 358–361 (3:125); *Hartranft v. Weig-*

§ 1142. **Bills of exceptions to the admission of evidence.**—A bill of exceptions to the admission of evidence should show (1) that the party duly objected to its admission, (2) that his objection was overruled by the court, and (3) that he excepted to the ruling of the court while the jury were at the bar. The fact that objections to the admission of evidence were made upon the trial and overruled by the court is not sufficient, in the absence of an exception, to bring them before the appellate court.¹¹ And only so much of the evidence given at the trial, or other proceedings, as is necessary to present clearly the matters of law excepted to should be preserved in a bill of exceptions; all beyond this serves only to encumber and confuse the record, and to perplex and embarrass both court and counsel.¹² The bill of exceptions should show that the party in making his objection pointed out specifically the part of the evidence objected to, for, if it covers any admissible evidence, the exception to the ruling of the court upon it cannot be sustained;¹³ and where a question addressed to a witness is, in itself, unobjectionable, but the answer goes beyond the question, and is inadmissible and improper, an objection to the question will not reach the answer, and a separate objection to it should be made by a motion to exclude it, and it should so appear in the bill of exceptions.¹⁴

§ 1143. **Bills of exception to the exclusion of evidence.**—A bill of exceptions to the ruling of the court in excluding testimony offered upon the trial, must state the facts which the party expected to prove and that they were material to some

mann, 121 U. S. 609–616 (30:1012); *Stephen, Pl.* (Philadelphia ed. 1824) 112–114; 2 *Tidd's Prac.* (1807) 791–795; *Ante* secs. 1104, 1106, 1107, 1136.

¹¹ *United States v. Breitling*, 20 How. 252–255 (15:900); *Scott v. Lloyd*, 9 Pet. 418 (9:178); *Hanna v. Maas*, 122 U. S. 24–27 (30:1117); *Newport News & Mississippi Valley Co. v. Pace*, 158 U. S. 36–40 (39:887); *Poole v. Fleeger*, 11 Pet. 185 (9:680).

¹² *Zeller v. Eckert*, 4 How. 289–298 (11:979); *Johnson v. Jones*, 1

Black, 209–227 (17:117); *Phillips v. Preston*, 5 How. 278–294 (12:152); *Arthurs v. Hart*, 17 How. 14 (15:33); *United States v. Morgan*, 11 How. 158 (13:645); *Lees v. United States*, 150 U. S. 476–483 (37:1150); *Pennock v. Dialogue*, 2 Pet. 1–24 (7:327); *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408–434 (36:485).

¹³ *United States v. McMaster*, 4 Wall. 680–684 (18:311).

¹⁴ *Gould v. Day*, 94 U. S. 405–414 (24:232).

issue or issues involved in the cause. A party who complains of the rejection of evidence tendered by him must show that he was injured by the rejection; and his bill of exceptions must make it appear that if it had been admitted, it might have led the jury to a different verdict. A rule of the supreme court requires that, when the error assigned is to the admission or rejection of evidence, the specification shall quote the full substance of the evidence offered, or copy the offer as stated in the bill of exceptions. This is to enable the court to see whether the evidence offered is material, for it would be idle to reverse a judgment for the admission or rejection of evidence that could have had no effect upon the verdict. It is a settled rule that an assignment of error based upon the exclusion by the trial court of an answer given in the deposition of a witness, to a particular question, will be disregarded by the appellate court if the answer, or the full substance of it, is not set forth in the record by the bill of exceptions.¹⁵

§ 1144. Exceptions to the ruling of the court in giving and refusing instructions to the jury—When taken.—It is a fundamental rule of the federal procedure, settled by an unbroken line of decisions of the supreme court, that, in the trial of civil actions at common law, exceptions to the ruling of the court in giving and refusing instructions to the jury must be taken in open court, and while the jury remain at the bar, and before they have withdrawn to deliberate upon their verdict; and if the exceptions be not so taken, the ruling of the court in giving and refusing the instructions cannot be revised upon writ of error. No instruction to the jury, given or refused by the trial court, can be carried to the appellate court for revision by writ of error, unless the record shows that the exception to it was taken or reserved while the jury were at the bar. This rule is not a mere formal or technical one. It was introduced and is adhered to for purposes of justice. For if it be brought to the attention of the court that one of the parties excepts to his opinion, he has an opportunity of reconsidering or explaining

¹⁵ *Shauer v. Altérton*, 151 U. S. (22:513); *Thompson v. National Bank*, 111 U. S. 529-541 (28:507); *Union Packet Co. v. Clough*, 20 Southern Ry. Co. v. Lester, 81 C. C. Wall. 528-543 (22:406); *Florida R. Co. v. Smith*, 21 Wall. 255-264 A. 53-55.

it more fully to the jury. It is not necessary that the bill of exceptions embodying the exception should be formally drawn and signed, before the trial is at an end. It will be sufficient if the exception be taken while the jury remain at the bar, and noted by the court with requisite certainty; and it may afterwards, during the term of the court, or within a further time allowed by special order entered at that term, or by a standing rule of the court, or by consent of parties, be reduced to form, and allowed and signed by the judge and filed in the cause.¹⁶

¹⁶ *Phelps v. Mayer*, 15 How. 160-161 (14:643); *Turner v. Yates*, 16 How. 14-29 (14:824); *Barton v. Forsyth*, 20 How. 53-534 (15:1012); *Walton v. United States*, 9 Wheat. 650-658 (6:182); *Bradstreet v. Thomas*, 4 Pet. 102-107 (7:796); *Brown v. Clarke*, 4 How. 4-15 (11:850); *Pittsburgh, Cincinnati & St. Louis Ry. Co. v. Heck*, 102 U. S. 120 (26:58); *Dredge v. Forsyth*, 2 Black, 563-571 (17:253); *Western Union Telegraph Co. v. Baker* (C. C. A.), 85 Fed. R. 690; *Merchants Exchange Bank v. McGraw*, 76 Fed. R. 930, 22 C. C. A. 622; *Bracken v. Ry. Co.*, 5 C. C. A. 548; *Southerland v. Round*, 6 C. C. A. 428; *Park Bros. & Co. v. Bushnell*, 9 C. C. A. 138; *Ry. Co. v. Spencer*, 18 C. C. A. 114; *Johnson v. Garber*, 19 C. C. A. 556; *Emanuel v. Gates*, 3 C. C. A. 663; *Price v. Pankhurst*, 3 C. C. A. 551.

In *Phelps v. Mayer*, *supra*, Chief Justice Taney, delivering the opinion of the court, said:

"The case was submitted to a jury under certain directions from the court, and the verdict and judgment were for defendant. This writ of error is brought for the purpose of revising this judgment, and the case has been fully argued upon the charge given by the circuit court, and also upon its refusal to give sundry directions to

the jury which were requested by the plaintiff. But, although it appears by the certificate of the judge, sent up as part of the record, that these instructions were given and refused at the trial, yet it also appears that no exception was taken to them while the jury remained at the bar. * * *

"It has been repeatedly decided by this court, that it must appear by the transcript, not only that the instructions were given or refused at the trial, but also the party who complains of them excepted to them while the jury were at the bar. The statute of Westminster 2d, which provides for the proceeding by exception, requires, in explicit terms, that this should be done; and if it is not done, the charge of the court, or its refusal to charge as requested, form no part of the record, and cannot be carried before the appellate court by writ of error."

In *Price v. Pankhurst*, *supra*, Justice Caldwell, delivering the opinion of the court, said:

"It is the duty of the party excepting to call the attention of the court distinctly to the portions of the charge he excepts to, and this must be done before the cause is finally submitted to the jury, to the end that the court may have an opportunity to correct or explain

§ 1145. Exceptions to the court's charge must be specific—Counsel must except "distinctly and severally."—Every "bill of exception ought to be upon some single point of law;"¹⁷ and every exception to the court's charge should be addressed to some separate, distinct and specific proposition of law contained in it; and if there be, in the opinion of counsel, more than one unsound proposition of law embraced in the court's instructions to the jury, he should make each one of them the subject of a specific, distinct and separate exception, and, if overruled by the trial court, he should take a separate bill of exceptions, complete in itself, to the court's ruling upon each exception. The court's charge most usually contains a series of independent, substantive propositions of law, or instructions

the parts of the charge excepted to, if it seems proper to do so. The practice, which, it has been admitted at the bar, sometimes obtains, of taking a general exception to the whole charge, with leave to specify particular exceptions after the trial, is a plain violation of the letter and spirit of the rule. The party who conceives that the charge is erroneous in any respect, and remains silent, will not be heard to point out the error after trial; and a general exception to the whole charge, any part of which is good, is equivalent to silence. The rule is mandatory. Its enforcement does not rest in the discretion of the lower court."

¹⁷ *Ex parte Crane*, 5 Pet. 190-223 (8:92). In this case (decided in 1831), which was an application for a mandamus to compel the trial court to sign a bill of exceptions embodying the entire charge of the court, which mandamus was refused, Chief Justice Marshall, delivering the opinion of the court, said:

"At common law a writ of error lay for error in law apparent on the record, but not for an error in law not apparent on the record.

If any party alleged any matter of law at the trial and was overruled by the judge, he was without redress, the error not appearing on the record. To remedy this evil, the statute was passed which gives the bill of exceptions. It is to correct an error of law. * * * It is also stated in the books that a bill of exceptions ought to be upon some point of law, either in admitting or denying evidence, or a challenge on some matter of law arising upon a fact not denied, in which either party is overruled by the court. A bill of exceptions is not to draw the whole matter into examination again; it is only for a single point, and the truth of it can never be doubted after the bill is sealed. * * * If an exception may be taken in such form as to bring the whole charge of the judge before the court, a charge in which he not only states the results of law from the facts, but sums up all the evidence, the exception will not be on a single point; it will not bring up some matter of law arising upon a fact not denied, it will draw the whole matter into examination again."

to the jury, applicable to the different issues of fact involved in the case; and it is well settled that, it is the duty of a party or his counsel, excepting to such a charge or series of propositions or instructions, to except to them specifically, "distinctly and severally," and to call the attention of the court to the specific propositions of law that are deemed erroneous, and where they are excepted to in mass the exception will be overruled, if any one of the propositions be correct. The language of the decisions and the rules of the appellate courts is to the effect that: exceptions to the charge must be specific and not general; and that the trial court is entitled to a distinct specification of the matters of law to which exception is made; and that the attention of the court should be "specifically called at the time to any particular part of the charge that" is "deemed erroneous;" and that "it is the duty of counsel excepting to propositions submitted to the jury to except to them distinctly and severally;" and that "the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts." The undoubted rule is, that each proposition of law deemed erroneous should be made the subject of a distinct and separate exception, and embodied in a separate bill of exceptions, sufficient in itself to present to the appellate court, upon writ of error, the "single point of law."¹⁸

¹⁸ U. S. Supreme Court Rule 4 (adopted in 1832); *Newport News & Mississippi Valley Co. v. Pace*, 158 U. S. 36-40 (39:887); *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183-197 (30:644); *Block v. Darling*, 140 U. S. 234-239 (35:476); *United States v. Conkling*, 1 Wall. 644-655 (17:714); *Johnston v. Jones*, 1 Black, 207-227 (17:117); *Beaver v. Taylor*, 93 U. S. 46-55 (23:797); *Jones v. R. Co.*, 157 U. S. 682-683 (39:856); *Beckwith v. Bean*, 98 U. S. 266-308 (25:124); *Ry. Co. v. Spencer* (C. C. A.) 71 Fed. R. 93; *Price v. Pankhurst*, 3 C. C. A. 551; *United States v. Rendskopf*, 105 U. S. 418-422 (26:1131); *Stimpson v. Westchester*

R. Co., 3 How. 553-556 (11:272); *Letitia v. Wilson*, 102 U. S. — (26:212).

In a case decided in 1822 (*Carver's Case*, 4 Pet. 80), Mr. Justice Story, delivering the opinion of the court, said:

"We take this occasion to express our decided disapprobation of the practice (which seems of late to have gained ground), of bringing the charge of the court below at length before this court for review. It is an unauthorized practice, and extremely inconvenient both to the inferior and to the appellate court." And in a case decided in 1831 (*Ex parte Crane*, 5 Pet. 198), Chief Justice

§ 1146. Requested charges—When the general charge of the court covers the entire case.—It is not error for the trial court to refuse to charge as requested by counsel, where the rules of law embodied in the requested charge are properly laid down in the general charge of the court. It is the settled law that, if the general charge given by the trial court covers the entire case, and submits it properly, fully and fairly to the jury, the duty resting on the judge is well discharged, and it is not error to refuse to instruct further at the request of the parties or either of them. If any of the propositions in a requested charge be covered by the general charge of the court, there is no obligation on the judge to repeat them in the language of counsel. The rule, it is said, is a wise one, and prevents the jury from being confused by a multiplicity of counsels, and promotes the right administration of justice.¹⁹

§ 1147. Same—A series of instructions presented as one request.—Where a party to the action presents to the court a series of instructions, as one single request, and asks that they be given in the aggregate to the jury, it is not error for the court to refuse the entire series, if any one proposition be unsound, although there be propositions in the series, which, if asked separately, ought to be given; and an exception to the

Marshall, quoting the disapproving statement of Mr. Justice Story, said:

“After such an expression of opinion of this court, it could not be expected that a judge on his circuits would so utterly disregard it as to allow an exception to his whole charge.”

In 1832, the supreme court, for the purpose of suppressing the practice of allowing exceptions to the whole charge of the court, adopted and promulgated its rule 38, now, with slight verbal changes, supreme court Rule 4.

And in a case decided in 1886, Mr. Justice Gray, delivering the opinion of the court, said: “The whole charge to the jury is made part of the bill of exceptions, in

accordance with a practice which this court for more than half a century has emphatically condemned, and has, by repeated decisions, as well as by express rule, constantly endeavored to suppress.” (*Life Ins. Co. v. Raddin*, 120 U. S. 183.)

¹⁹ *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23: 898); *Ruch v. Rock Island*, 97 U. S. 693-697 (24:1101); *Laber v. Cooper*, 7 Wall. 565-571 (19:151); *Northwestern Mutual Life Ins. Co. v. Muskogee Nat. Bank*, 122 U. S. 501-513 (30:1100); *Burton v. Driggs*, 20 Wall. 125-137 (22:299); *Iron Silver Mining Co. v. Cheesman*, 116 U. S. 529-538 (29:712); *Ly. Co. v. Spencer*, 18 C. C. A. 114; *Railway Co. v. Jarvi*, 3 C. C. A. 433.

ruling of the court in refusing the whole series cannot be maintained.²⁰

§ 1148. **Same—Exception to the portion of court's charge which is variant from requested charge.**—An exception to such portions of the charge given by the court to the jury as are variant from the charges requested by a party, without distinctly pointing out the variances, is too general, and cannot be sustained. It is not the duty of the trial court, nor of the appellate court, upon writ of error, to analyze and compare the requests and the charge given, in order to discover what are the portions to which exception is made. One object to an exception to the charge is to call the attention of the court to the precise points as to which it is supposed he has erred, that he may then and there consider it, and give new and different instructions to the jury, if in his judgment it should be proper to do so, and the allowance of an exception in the form above mentioned would defeat that object.²¹ An exception to the modification by the court, in its general charge, of a particular proposition submitted by one of the parties without stating specifically the modification to which objection is made, is too vague and indefinite.²²

§ 1149. **Bills of exception taken to the rulings of the court in giving and refusing instructions—What to contain.**—In passing upon the questions presented in a bill of exceptions, the appellate courts will not look beyond the bill itself. The pleadings, and the statements in the bill, the verdict and the judgment, are the only matters that are properly before the court.²³ Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone that the court is to decide.²⁴ Bills of exception to the

²⁰ *Beaver v. Taylor*, 93 U. S. 46-55 (23:797); *Indianapolis & St. Louis R. Co. v. Horst*, 93 U. S. 291-301 (23:898); *Harvey v. Tyler*, 2 Wall. 328-350 (17:871); *Newport News & Mississippi Valley Co. v. Pace*, 158 U. S. 36-40 (39:887); *Bogk v. Gassert*, 149 U. S. 17-30 (37:631); *United States v. Hough*, 103 U. S. 71-74 (26:305); *Worthington v. Mason*, 101 U. S. 149-153 (25:848); *Union Pacific R. Co. v. Callaghan*, 161 U. S. 91-95 (40:

628); *Union Ins. Co. v. Smith*, 124 U. S. 405-429 (31:497).

²¹ *Beaver v. Taylor*, 93 U. S. 46-55 (23:797).

²² *Connecticut Mutual Life Ins. Co. v. Union Trust Co.*, 112 U. S. 250-261 (28:708).

²³ *Reed v. Gardner*, 17 Wall. 409-411 (21:665).

²⁴ *Dunlap v. Monroe*, 7 Cranch, 242-270 (3:329); *Jones v. Buckell*, 104 U. S. 554-556 (26:841).

rulings of the court in giving and refusing instructions must contain (1) a statement of the matters of law in the instructions given or refused to which the party excepts,²⁵ and (2) a statement of the relevant testimony given or offered, and which is necessary to enable the court to determine the correctness or incorrectness of the ruling of the court of which complaint is made.²⁶

§ 1150. Same—Same—Supreme court rule.—A rule of the supreme court of the United States, promulgated in 1832,²⁷ is as follows:

“The judges of the circuit and district courts, shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of said charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.”²⁸

This express rule is declaratory of the rule established prior to its promulgation by the decisions of the supreme court and which had been the rule in England from the time of the act of parliament giving the remedy by bill of exceptions.²⁹ When, in a bill of exceptions, complaint is made of the instructions given or refused, it must be accompanied by a distinct statement of testimony given or offered which raises the question

²⁵ U. S. Supreme Court Rule, 4; U. S. Circuit Court of Appeals Rule 10; *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183-197 (30:644); *Lees v. United States*, 150 U. S. 476-483 (37:1150).

²⁶ *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183-197 (30:644); *New York, Lake Erie & Western R. Co. v. Madison*, 123 U. S. 524-527 (31:258); *Jones v. Buckell*, 104 U. S. 554-556 (26:841); *Reed v. Gardner*, 17 Wall. 409-411 (21:656); *United States v. Morgan*, 11 How. 154-163 (13:643); *Zeller v. Eckert*, 4 How. 289-298 (11:979); *Vasse v. Smith*, 6 Cranch, 226-233 (3:207).

²⁷ *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183-197 (30:644).

²⁸ U. S. Supreme Court Rule 4; and to the same effect is Rule 10 of the U. S. Circuit Courts of Appeals.

²⁹ *Carver v. Jackson*, 4 Pet. 1-101 (7:761); *Ex parte Crane*, 5 Pet. 190-223 (8:92); *Conrad v. Ins. Co.*, 6 Pet. 262-282 (8:392); *Magniac v. Thompson*, 7 Pet. 348-398 (8:709); *Gregg v. Sayer*, 8 Pet. 244-255 (8:932); *Phoenix Mutual Life Ins. Co. v. Raddin*, 120 U. S. 183-197 (30:644).

to which the instructions apply. The proof of the facts which make the charge erroneous must be distinctly set forth, or it must appear that evidence was given tending to prove them.³⁰

§ 1151. Same—How much of the evidence should be set out in bill of exceptions—General rule.—It is a settled rule that a bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law, in reference to the questions in dispute between the parties to the case, and which may relate to exceptions noted at the trial. A bill of exceptions should not include, nor, as a rule, does it include, all the evidence given on the trial upon questions about which there is no controversy, but which it was necessary to introduce as proof of the plaintiff's right to bring the action, or of other matters of like nature.³¹

As a matter of course, when the trial court directs a verdict, and the losing party excepts to the ruling of the court, he must, in order to secure a revision of that ruling upon writ of error, embody all the evidence in the bill of exceptions.³²

§ 1152. Authentication of bills of exceptions.—A bill of exceptions allowed in any cause in a circuit or district court of the United States shall be deemed sufficiently authenticated if signed by the judge of the court in which the cause was tried, or by the presiding judge thereof if more than one judge sat at the trial of the cause, without any seal of the court or judge annexed thereto; and in case the judge before whom the cause has been tried is, by reason of death, sickness, or other disability, unable to allow and sign the bill of exceptions, then the judge who succeeds such trial judge, or any other judge of the court in which the cause was tried, holding such court thereafter, if the evidence in the cause has been or is taken in

³⁰ *New York, Lake Erie & Western R. Co. v. Madison*, 123 U. S. 524-527 (31:258).

³¹ *Grand Trunk Ry. Co. v. Ives*, 144 U. S. 408-434 (36:485).

³² *Stewart v. Lansing*, 104 U. S. 505-512 (26:866); *Griggs v. Houston*, 104 U. S. 553-554 (26:840); *Randall v. Baltimore & Ohio R. Co.*, 478-485 (27:1003); *Marshall v. Hubbard*, 117 U. S. 415-419 (29:

919); *Montclair v. Dana*, 107 U. S. 162-163 (27:436); *North Pennsylvania R. Co. v. Commercial Nat. Bank*, 123 U. S. 727-739 (31:287); *Delaware, Lackawana & Western R. Co. v. Converse*, 139 U. S. 469-477 (35:213); *Goodett v. Louisville & Nashville R. Co.*, 122 U. S. 391-412 (30:1230); *Gunther v. Liverpool & London & Globe Ins. Co.*, 134 U. S. 110-116 (33:857).

stenographic notes, or if such judge is satisfied by any other means that he can allow a true bill of exceptions, shall allow and sign such bill of exceptions, which shall be as valid as if done by the judge before whom the cause was tried; but if such judge is satisfied that, owing to the fact that he did not preside at the trial, or for any other cause, he cannot fairly allow and sign the bill of exceptions, then he may in his discretion grant a new trial to the party moving for it.³³

§ 1153. Mandamus to compel the trial judge to settle and sign a bill of exceptions.—A writ of mandamus may be properly issued by the supreme court to compel the trial judge to settle and sign a bill of exceptions. Such a writ does not undertake to control the discretion of the judge as to how he shall frame the bill of exceptions, or how he shall decide any point arising on its settlement; but it only compels him to settle and sign it in some form. Such a writ is agreeable to the principles and usages of law, and may be necessary for the exercise of the jurisdiction of the appellate court.³⁴

§ 1154. Order giving time to prepare a bill of exceptions.—Under extraordinary circumstances, a party may have, by standing order, or special order entered, or consent of parties given, during the term at which the judgment is entered, further time after the adjournment of the term, in which to prepare, serve and tender to the judge a bill of exceptions; and the judge may lawfully allow and sign the same.³⁵

³³ 31 U. S. Stat. at L. ch. 717, sec. 1, p. 270; 4 Fed. Stat. Anno. 594-595; U. S. Comp. Stat. 1901, p. 696.

³⁴ *Ex parte Chateaugay Ore & Iron Co.*, 128 U. S. 544-557 (32:

508); *Ex parte Crane*, 5 Pet. 190-223 (8:92).

³⁵ *Michigan Insurance Bank v. Eldred*, 143 U. S. 293-305 (36:162); *Waldron v. Waldron*, 156 U. S. 361-384 (39:453).

CHAPTER XXXI.

THE WRIT OF ERROR FOR THE REVIEW OF THE FINAL JUDGMENTS OF THE CIRCUIT COURTS OF THE UNITED STATES IN SUITS AT COMMON LAW.

§ 1155. Judgments in suits at common law reviewed upon writ of error only.

1156. Application for the writ.

1157. When and by what judges allowed.

1158. By what clerks issued.

1159. Service of the writ of error.

§ 1160. Return of the writ of error.

1161. Service of citation in error—Return.

1162. Time within which writ of error must be sued out.

1163. Reference to a discussion of writs of error in a previous chapter.

§ 1155. Judgments in suits at common law reviewed upon writ of error only.—The final judgments of the federal district and circuit courts can be reviewed, re-examined and reversed in an appellate court only upon writ of error, which brings up points of law only for review; and there can be no reversal upon writ of error “for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact.”¹

At common law, there was no method for the re-examination of facts tried by a jury, except the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the awarding of a *venire facias de novo*, by an appellate court, upon writ of error, for some error of law which intervened in the proceedings in the trial court.² The writ of error carries up the whole record of the proceedings in the lower court, and not only the bills of

¹ U. S. Const. VII Amndt.; *Parsons v. Bedford*, 3 Pet. 433-458 (7:732); *Sarchet v. United States*, 12 Pet. 143-144 (9:1033); *Burrows v. Carrow*, 15 Wall. 682-684 (21:249); U. S. Rev. Stat. sec. 1011; 4 Fed. Stat. Anno. 624; U

S. Comp. Stat. 1901, p. 715; 1 U. S. Stat. at L. ch. 20, sec. 22, p. 84; *Stephen*, Pl. (Philadelphia ed. 1824) 114-120.

² *Parsons v. Bedford*, 3 Pet. 433-458 (7:732).

exception, but the entire record, including the pleadings, process, verdict and judgment, is under the consideration of the appellate court, and that court may reverse the case for any fundamental error, whether assigned or not.³

§ 1156. Application for the writ.—The plaintiff in error, in order to obtain the writ, must file with the clerk of the circuit court his petition for it, accompanied with an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged, and a prayer for reversal, and no writ of error can be allowed until the assignment of errors shall have been filed. When the error alleged is to the admission or rejection of evidence, the assignment of errors must quote the full substance of the evidence admitted or rejected; and when the error alleged is to the charge of the court, the assignment of errors must set out the part referred to in *totidem verbis*, whether it be instructions given or instructions refused.⁴

§ 1157. When and by what judges allowed.—A writ of error may be allowed in term time or in vacation, by any justice of the supreme court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him; and he may also grant a supersedeas and stay of execution pending the writ of error.⁵

§ 1158. By what clerks issued.—The writ of error may be issued by the clerk of the supreme court, and the clerks of the circuit courts;⁶ and, inasmuch as the clerks of the United States circuit courts of appeals are authorized by law to “perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised by the clerk of the supreme court of the United States, so far as the same may be

³ *Bank v. Smith*, 11 Wheat. 172; *Scott v. Sandford*, 19 How. 393-633 (15:700) opinion of Chief Justice Taney.

⁴ U. S. Supreme Court Rule 35; U. S. Circuit Court of Appeals Rule 11; U. S. Rev. Stat. sec. 997.

⁵ U. S. Rev. Stat. sec. 999; 4 Fed. Stat. Anno. 610; U. S. Comp.

Stat. 1901, p. 712; U. S. Super. Court Rules 29 and 36; U. S. Rev. Stat. secs. 1000, 1007; 4 Fed. Stat. Anno. 612, 618; U. S. Comp. Stat. 1901, pp. 712, 714; U. S. Circuit Court of Appeals Rule 13.

⁶ U. S. Rev. Stat. sec. 1004; 4 Fed. Stat. Anno. 616; U. S. Comp. Stat. 1901, p. 713.

applicable," such clerks, it would seem, are also authorized to issue writs of error.⁷

§ 1159. **Service of the writ of error.**—The writ of error is served by filing it with the clerk of the court to which it is directed; the writ is not brought, in the legal meaning of the term, until it is filed in the court which rendered judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period prescribed by law for bringing it must be calculated accordingly.⁸

§ 1160. **Return of the writ of error.**—The writ is returned by sending it to the appellate court, at the day and place therein mentioned, with an authenticated transcript of the record, an assignment of errors, with prayer for reversal, and a citation to the adverse party.⁹

§ 1161. **Service of citation in error—Return.**—All writs of error and citations must be made returnable not exceeding thirty days from the day of signing the citation; the defendant shall have at least thirty days' notice; and the citation may be served upon the defendant in error, or upon his counsel of record.¹⁰

§ 1162. **Time within which writ of error must be sued out.**—Writs of error to review the judgments of the circuit and district courts by the United States circuit courts of appeals must be sued out within six months from the entry of the final judgment sought to be reviewed;¹¹ and to review the judgment by the supreme court, the writ of error must be sued out within two years after the entry of such judgment.¹²

⁷ 26 U. S. Stat. at L. ch. 517, sec. 2, p. 826.

⁸ Ante sec. 446; *Brooks v. Norris*, 11 How. 204-208 (13:665); *Mussina v. Cavazos*, 6 Wall. 355-363 (18:810); *Scarborough v. Paragoud*, 108 U. S. 567-568 (27:824); *Ableman v. Booth*, 21 How. 506 (16:169); *Davidson v. Lanier*, 4 Wall. 447-458 (18:377).

⁹ U. S. Rev. Stat. sec. 997; U. S. Supreme Court Rule 8, sec. 1; Ante sec. 446.

¹⁰ Ante secs. 451, 452 where the rule is fully stated and author-

ities cited; 2 *Bates*, Fed. Eq. Proc. secs. 821-826.

¹¹ 26 U. S. Stat. at L. ch. 517, sec. 11, p. 826; 4 Fed. Stat. Anno. 428; *Kigman & Co. v. Western Mfg. Co.*, 170 U. S. 675-681 (42:1192).

¹² U. S. Rev. Stat. sec. 1008; 4 Fed. Stat. Anno. 622; U. S. Comp. Stat. 1901, p. 715; *Allen v. Southern Pacific R. Co.*, 173 U. S. 479-492 (43:775); *Holt v. Indiana Manufacturing Co.*, 175 U. S. 68-73 (44:374).

§ 1163. Reference to a discussion of writs of error in a previous chapter.—In a previous chapter¹⁸ of this work on “the federal appellate jurisdiction,” there is a rather full discussion of the remedy by writ of error, in connection with the appellate jurisdiction of the United States supreme court over the judgments and decrees of the highest courts of the state where a federal question is involved, to which reference is made, to supply the brevity of statement in this chapter. The two chapters taken together will, it is believed, be found to contain a full statement of the legal rules and procedure upon the subject.

¹⁸ Ante Chap. X, secs. 418–467.

APPENDIX I.

CONSTITUTION OF UNITED STATES—1787

WE, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America.

Chisholm v. Georgia, 2 Dall. 419; *McCulloch v. Maryland*, 4 Wheat. 316; *Brown v. Maryland*, 12 Wheat. 419; *Barron v. Baltimore*, 7 Pet. 243; *Lane County v. Oregon*, 7 Wall. 71; *Texas v. White*, 7 Wall. 700.

ARTICLE I.

SECTION 1. All legislative powers herein granted shall be vested in a congress of the United States, which shall consist of a senate and house of representatives..

Hayburn's Case (notes), 2 Dall. 409.

SECTION 2. ¹ The house of representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

² No person shall be a representative who shall not have attained to the age of twenty-five years and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state in which he shall be chosen.

³ * [Representatives and direct taxes shall be apportioned among the several states which may be included within this Union according to their respective numbers, which shall be determined by adding to the whole number of free persons, in-

* The clause included in brackets is amended by the fourteenth amendment, second section.

cluding those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons.] The actual enumeration shall be made within three years after the first meeting of the congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of representatives shall not exceed one for every thirty thousand, but each state shall have at least one representative; and until such enumeration shall be made, the state of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

Veazie Bank v. Fenno, 8 Wall. 533; *Scholey v. Rew*, 23 Wall. 331.

⁴ When vacancies happen in the representation from any state, the executive authority thereof shall issue writs of election to fill such vacancies.

⁵ The house of representatives shall chose their speaker and other officers, and shall have the sole power of impeachment.

SECTION 3. ¹ The senate of the United States shall be composed of two senators from each state, chosen by the legislature thereof, for six years, and each senator shall have one vote.

² Immediately after they shall be assembled in consequence of the first election, they shall be divided as equally as may be into three classes. The seats of the senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen by resignation, or otherwise, during the recess of the legislature of any state, the executive thereof may make temporary appointments until the next meeting of the legislature, which shall then fill such vacancies.

³ No person shall be a senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that state for which he shall be chosen.

⁴ The vice-president of the United States shall be president of the senate, but shall have no vote, unless they be equally divided.

⁵ The senate shall choose their other officers, and also a president *pro tempore*, in the absence of the vice-president, or when he shall exercise the office of president of the United States.

⁶ The senate shall have the sole power to try all impeachments. When sitting for that purpose they shall be on oath or affirmation. When the president of the United States is tried, the chief justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

⁷ Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment, according to law.

SECTION 4. ¹ The times, places, and manner of holding elections for senators and representatives shall be prescribed in each state by the legislature thereof; but the congress may, at any time, by law, make or alter such regulations, except as to the places of choosing senators.

Ex parte Siebold, 100 U. S. 371; *Ex parte Yarborough*, 110 U. S. 651.

² The congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

SECTION 5. ¹ Each house shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each house may provide.

² Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Anderson v. Dunn, 6 Wheat. 204; *Kilbourn v. Thompson*, 103 U. S. 168.

³ Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal.

Field v. Clark, 143 U. S. 649; *United States v. Bollin*, 144 U. S. 1.

⁴ Neither house, during the session of congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

SECTION 6. ¹ The senators and representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place.

Coxe v. McClenachan, 3 Dall. 478.

² No senator or representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States, which shall have been created, or the emoluments whereof shall have been increased, during such time; and no person holding any office under the United States, shall be a member of either house during his continuance in office.

SECTION 7. ¹ All bills for raising revenue shall originate in the house of representatives; but the senate may propose or concur with amendments as on other bills.

² Every bill which shall have passed the house of representatives and the senate, shall, before it become a law, be presented to the president of the United States; if he approve he shall sign it, but if not he shall return it with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house, it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the president within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law, in like manner as if he had signed it, unless the congress

by their adjournment prevent its return, in which case it shall not be a law.

³ Every order, resolution, or vote to which the concurrence of the senate and house of representatives may be necessary (except on a question of adjournment) shall be presented to the president of the United States; and before the same shall take effect, shall be approved by him, or being disapproved by him, shall be repassed by two-thirds of the senate and house of representatives according to the rules and limitations prescribed in the case of a bill.

SECTION 8. The congress shall have power ¹ to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

Hylton v. United States, 3 Dall. 171; *McCulloch v. Maryland*, 4 Wheat. 316; *Loughborough v. Blake*, 5 Wheat. 317; *Osborn v. Bank of United States*, 9 Wheat. 738; *Weston v. Charleston*, 2 Pet. 449; *Dobbins v. Erie County*, 16 Pet. 435; *License Cases*, 5 How. 504; *Cooley v. Wardens of Philadelphia*, 12 How. 299; *McGuire v. Commonwealth*, 3 Wall. 387; *Van Allen v. Assessors*, 3 Wall. 573; *Bradley v. People*, 4 Wall. 459; *License Tax Cases*, 5 Wall. 462; *Pervear v. Commonwealth*, 5 Wall. 475; *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *Veazie Bank v. Fenno*, 8 Wall. 533; *Collector v. Day*, 11 Wall. 113; *United States v. Singer*, 15 Wall. 111; *State Tax on Foreign-held Bonds*, 15 Wall. 300; *United States v. Railroad Co.*, 17 Wall. 322; *Railroad Co. v. Peniston*, 18 Wall. 5; *Scholey v. Rew*, 23 Wall. 331; *Springer v. United States*, 102 U. S. 586; *Legal Tender Case*, 110 U. S. 421; *California v. Central Pac. R. Co.*, 127 U. S. 1; *Ratterman v. Western Union Tel. Co.*, 127 U. S. 411; *Leloup v. Mobile*, 127 U. S. 640; *Horner v. United States*, 143 U. S. 207.

² To borrow money on the credit of the United States;

McCulloch v. State of Maryland, 4 Wheat. 316; *Weston v. Charleston*, 2 Pet. 449; *Bank v. New York City*, 2 Black, 620; *Bank Tax Cases*, 2 Wall. 200; *Bank v. Mayor*, 7 Wall. 16; *Bank v. Supervisors*, 7 Wall. 26; *Hepburn v. Griswold*, 8 Wall. 603; *National Bank v. Commonwealth*, 9 Wall. 353; *Parker v. Davis*, 12 Wall. 457; *Legal Tender Case*, 110 U. S. 421.

³ To regulate commerce with foreign nations, and among the several states and with the Indian tribes;

Gibbons v. Ogden, 9 Wheat. 1; *Brown v. Maryland*, 12 Wheat. 419; *Willson v. Black Bird Creek Marsh Co.*, 2 Pet. 245; *Worcester v. Georgia*, 6 Pet. 515; *City of New York v. Miln*, 11 Pet. 102; *United States v.*

Coombs, 12 Pet. 72; Holmes v. Jennison, 14 Pet. 540; License Cases, 5 How. 504; Passenger Cases, 7 How. 283; Nathan v. Louisiana, 8 How. 73; Mager v. Grima, 8 How. 490; United States v. Marigold, 9 How. 560; Cooley v. Wardens of Philadelphia, 12 How. 299; The Genesee Chief v. Fitzhugh, 12 How. 443; Pennsylvania v. Wheeling Bridge Co., 13 How. 518; Veazle v. Moore, 14 How. 568; Smith v. Maryland, 18 How. 71; Pennsylvania v. Wheeling & Belmont Bridge Co. et al., 18 How. 421; Sinnitt v. Davenport, 22 How. 227; Foster v. Davenport, 22 How. 244; Conway v. Taylor's Ex'r, 1 Black, 603; United States v. Holliday, 3 Wall. 407; Gilman v. Philadelphia, 3 Wall. 713; The Passaic Bridges, 3 Wall. 782; Steamship Co. v. Port Wardens, 6 Wall. 31; Crandall v. Nevada, 6 Wall. 35; White's Bank v. Smith, 7 Wall. 646; Waring v. The Mayor, 8 Wall. 110; Paul v. Virginia, 8 Wall. 168; Thomson v. Pacific R. Co., 9 Wall. 579; Downham v. Alexandria, 10 Wall. 173; The Clinton Bridge, 10 Wall. 454; The Daniel Ball, 10 Wall. 557; Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566; The Montello, 11 Wall. 411; Ex parte McNiel, 13 Wall. 236; State Freight Tax, 15 Wall. 232; State Tax on Railway Gross Receipts, 15 Wall. 284; Osborn v. Mobile, 16 Wall. 479; Railroad Co. v. Fuller, 17 Wall. 560; Bartemeyer v. Iowa, 18 Wall. 129; The Delaware Railroad Tax, 18 Wall. 206; Peete v. Morgan, 19 Wall. 581; Railroad Co. v. Richmond, 19 Wall. 484; Railroad Co. v. Maryland, 21 Wall. 456; The Lottawanna, 21 Wall. 558; Henderson v. City of New York, 92 U. S. 259; Chy Lung v. Freeman, 92 U. S. 275; South Carolina v. Georgia, 93 U. S. 4; Sherlock v. Alling, 93 U. S. 99; United States v. Forty-three Gallons of Whisky, 93 U. S. 188; Foster v. Wardens of New Orleans, 94 U. S. 246; Railroad Co. v. Husen, 95 U. S. 465; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Beer Co. v. Massachusetts, 97 U. S. 25; Cook v. Pennsylvania, 97 U. S. 566; Packet Co. v. St. Louis, 100 U. S. 423; Wilson v. McNamee, 102 U. S. 572; Moran v. New Orleans, 112 U. S. 69; Head Money Cases, 112 U. S. 580; Cooper v. Ferguson, 113 U. S. 727; Gloucester v. Pennsylvania, 114 U. S. 196; Brown v. Houston, 114 U. S. 622; Walling v. Michigan, 116 U. S. 446; Pickard v. Pullman, 117 U. S. 34; Tennessee v. Pullman, 117 U. S. 51; Sprague v. Thompson, 118 U. S. 90; Morgan v. Louisiana, 118 U. S. 455; Wabash v. Illinois, 118 U. S. 557; Huse v. Glover, 119 U. S. 543; Robbins v. Shelby, 120 U. S. 489; Corson v. Maryland, 120 U. S. 502; Barron v. Burnside, 121 U. S. 186; Fargo v. Michigan, 121 U. S. 230; Ouachita v. Aiken, 121 U. S. 444; Philadelphia & Southern R. Co. v. Pennsylvania, 122 U. S. 326; Western Union Tel. Co. v. Pendleton, 122 U. S. 347; Sands v. Manistee, 123 U. S. 288; Smith v. Alabama, 124 U. S. 465; Willamette v. Hatch, 125 U. S. 1; Pembina v. Pennsylvania, 125 U. S. 181; Bowman v. Chicago, 125 U. S. 465; Western Union Tel. Co. v. Massachusetts, 125 U. S. 630; California v. Central Pac. R. Co., 127 U. S. 1; Leloup v. Mobile, 127 U. S. 640; Kidd v. Pearson, 128 U. S. 1; Asher v. Texas, 128 U. S. 129; Stoutenberg v. Hennick, 129 U. S. 141; W. U. Tel. Co. v. Alabama, 132 U. S. 472; L., N. O. & T. R. Co. v. Mississippi, 133 U. S. 587; Leisy v. Hardin, 135 U. S. 100; Lyng v. Michigan, 135 U. S. 161; Cherokee Nation v. Southern Kan. R. Co., 135 U. S.

641; *McCall v. California*, 136 U. S. 104; *N. & W. R. Co. v. Pennsylvania*, 136 U. S. 114; *Minnesota v. Barber*, 136 U. S. 314; *Brimmer v. Rebman*, 138 U. S. 78; *Pullman P. Car Co. v. Pennsylvania*, 141 U. S. 18; *Crutcher v. Kentucky*, 141 U. S. 47; *Volght v. Wright*, 141 U. S. 62; *Maine v. Grand Trunk Ry. Co.*, 142 U. S. 217; *In re Rapier*, 143 U. S. 110; *N. O., C. & L. R. Co. v. New Orleans*, 143 U. S. 192; *Horn Co. v. New York*, 143 U. S. 305; *Ficklen v. Shelby County*, 145 U. S. 1; *Lehigh Valley R. Co. v. Pennsylvania*, 145 U. S. 192; *Brennan v. Titusville*, 153 U. S. 289; *Brass v. Staeser*, 153 U. S. 391; *Ashley v. Ryan*, 153 U. S. 436; *Luxton v. Bridge Co.*, 153 U. S. 525; *Telegraph Co. v. Charleston*, 153 U. S. 692; *Plumley v. Massachusetts*, 155 U. S. 461; *Railway Co. v. Transportation Co.*, 155 U. S. 585; *Hopper v. California*, 155 U. S. 648; *Postal Telegraph Co. v. Adams*, 155 U. S. 688; *United States v. Knight*, 156 U. S. 1; *Emert v. Missouri*, 156 U. S. 296; *Coal Co. v. Bates*, 156 U. S. 577; *Coal Co. v. Louisiana*, 156 U. S. 590; *Railway Co. v. Hefley*, 158 U. S. 98; *Railroad Co. v. Pennsylvania*, 158 U. S. 431; *Illinois Central R. Co. v. Illinois*, 163 U. S. 142; *Hennington v. Georgia*, 163 U. S. 299; *Telegraph Co. v. Taggart*, 163 U. S. 1; *Osborne v. Florida*, 164 U. S. 650; *Scott v. Donald*, 165 U. S. 58; *Express Co. v. Ohio*, 165 U. S. 194; *Railroad Co. v. New York*, 165 U. S. 628; *Gladson v. Minnesota*, 166 U. S. 427; *Railway Co. v. Solan*, 169 U. S. 133; *Railway Co. v. McCann*, 174 U. S. 580; *Addyston Co. v. United States*, 175 U. S. 211; *Railway Co. v. Kentucky*, 179 U. S. 387.

⁴ To establish an uniform rule of naturalization and uniform laws on the subject of bankruptcies throughout the United States;

Sturges v. Crowninshield, 4 Wheat. 122; *McMillan v. McNeill*, 4 Wheat. 209; *Farmers' & Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheat. 131; *Ogden v. Saunders*, 12 Wheat. 213; *Boyle v. Zacharie & Turner*, 6 Pet. 348; *Gassies v. Ballou*, 6 Pet. 761; *Beers et al. v. Haughton*, 9 Pet. 329; *Suydam et al. v. Broadnax*, 14 Pet. 67; *Cook v. Moffat et al.*, 5 How. 295; *Dred Scott v. Sanford*, 19 How. 393.

⁵ To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

Briscoe v. Bank of Kentucky, 11 Pet. 257; *Fox v. Ohio*, 5 How. 410; *United States v. Marigold*, 9 How. 560.

⁶ To provide for the punishment of counterfeiting the securities and current coin of the United States;

Fox v. Ohio, 5 How. 410; *United States v. Marigold*, 9 How. 560.

⁷ To establish post-offices and post-roads;

Pennsylvania v. Wheeling Bridge, 18 How. 421; *In re Rapier*, 143 U. S. 110.

⁸ To promote the progress of science and useful arts by securing, for limited times to authors and inventors, the exclusive right to their respective writings and discoveries;

Grant v. Raymond, 6 Pet. 218; Wheaton v. Peters, 8 Pet. 591.

⁹ To constitute tribunals inferior to the supreme court;

¹⁰ To define and punish piracies and felonies committed on the high seas, and offenses against the law of nations;

United States v. Palmer, 3 Wheat. 610; United States v. Wiltberger, 5 Wheat. 76; United States v. Smith, 5 Wheat. 153; United States v. Pirates, 5 Wheat. 184; United States v. Arizona, 120 U. S. 479.

¹¹ To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

Brown v. United States, 8 Cr. 110; American Ins. Co. v. Canter, 1 Pet. 511; Mrs. Alexander's Cotton, 2 Wall. 404; Miller v. United States, 11 Wall. 268; Tyler v. Defrees, 11 Wall. 331; Stewart v. Kahn, 11 Wall. 493; Hamilton v. Dillin, 21 Wall. 73; Lamar v. Browne, 92 U. S. 187.

¹² To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

Crandall v. Nevada, 6 Wall. 32.

¹³ To provide and maintain a navy;

United States v. Bevans, 3 Wheat. 336; Dynes v. Hoover, 20 How. 65.

¹⁴ To make rules for the government and regulation of the land and naval forces;

¹⁵ To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

Houston v. Moore, 5 Wheat. 1; Martin v. Mott, 12 Wheat. 19; Luther v. Borden, 7 How. 1; Crandall v. Nevada, 6 Wall. 35; Texas v. White, 7 Wall. 700.

¹⁶ To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states, respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by congress.

Houston v. Moore, 5 Wheat. 1; Martin v. Mott, 12 Wheat. 19; Luther v. Borden, 7 How. 1.

¹⁷ To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as may, by cession of particular states, and the acceptance of congress, become the seat of the government of the United States, and to

exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; and

Hepburn v. Ellzey, 2 Cr. 444; Loughborough v. Blake, 5 Wheat. 317; Cohens v. Virginia, 6 Wheat. 264; American Ins. Co. v. Canter, 1 Pet. 511; Kendall v. United States, 12 Pet. 524; United States v. Dewitt, 9 Wall. 41; Dunphy v. Kleinsmith, 11 Wall. 610; Willard v. Presbury, 14 Wall. 676; Phillips v. Payne, 92 U. S. 130; United States v. Fox, 94 U. S. 315; National Bank v. Yankton County, 101 U. S. 129; Ft. Leavenworth R. Co. v. Lowe, 114 U. S. 525; Chappell v. United States, 160 U. S. 499.

¹⁸ To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof.

McCulloch v. Maryland, 4 Wheat. 316; Wayman v. Southard, 10 Wheat. 1; Bank of United States v. Halstead, 10 Wheat. 51; Hepburn v. Griswold, 8 Wall. 603; National Bank v. Commonwealth, 9 Wall. 353; Thompson v. Pacific R. Co., 9 Wall. 579; Parker v. Davis, 12 Wall. 457; Railroad Co. v. Johnson, 15 Wall. 195; Railroad Co. v. Peniston, 18 Wall. 5; Legal Tender Case, 110 U. S. 421; In re Coy, 127 U. S. 731; Stoutenburgh v. Hennick, 129 U. S. 141; Chinese Exclusion Case, 130 U. S. 581.

SECTION 9. ¹ The migration or importation of such persons as any of the states now existing shall think proper to admit, shall not be prohibited by the congress prior to the year one thousand eight hundred and eight, but a tax or duty may be imposed on such importation, not exceeding ten dollars for each person.

Dred Scott v. Sanford, 19 How. 393.

² The privilege of the writ of *habeas corpus* shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it.

United States v. Hamilton, 3 Dall. 17; Hepburn v. Ellzey, 2 Cr. 445; Ex parte Bollman, 4 Cr. 75; Ex parte Kearney, 7 Wheat. 38; Ex parte Watkins, 3 Pet. 192; Ex parte Milburn, 9 Pet. 704; Holmes v. Jennison, 14 Pet. 540; Ex parte Dorr, 3 How. 103; Luther v. Borden, 7 How. 1; United States v. Booth, 21 How. 506; Ex parte Vallandigham, 1 Wall. 243; Ex parte Mulligan, 4 Wall. 2; Ex parte McCardle, 7 Wall. 506; Ex parte Yerger, 8 Wall. 85; Tarble's Case, 13 Wall. 397; Ex parte Lange, 18 Wall. 16; Ex parte Parks, 93 U. S. 18; Ex parte Karstendick, 93 U. S. 396; Ex parte Virginia, 100 U. S. 339; Ex parte Neagle, 135 U. S. 100; In re Lane, 135 U. S. 443.

³ No bill of attainder or *ex post facto* law shall be passed.

Fletcher v. Peck, 6 Cr. 87; Ogden v. Saunders, 12 Wheat. 213; Watson v. Mercer, 8 Pet. 88; Carpenter v. Pennsylvania, 17 How. 456; Locke v. New Orleans, 4 Wall. 172; Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Drehman v. Stifle, 8 Wall. 595; Klinger v. Missouri, 13 Wall. 257; Pierce v. Carskadon, 16 Wall. 234.

⁴ No capitation, or other direct tax, shall be laid, unless in proportion to the census of enumeration hereinbefore directed to be taken.

License Tax Cases, 5 Wall. 462; Springer v. United States, 102 U. S. 586; Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429.

⁵ No tax or duty shall be laid on articles exported from any state.

Cooley v. Wardens of Philadelphia, 12 How. 299; Page v. Burgess, 92 U. S. 372; Turpin v. Burgess, 117 U. S. 504.

⁶ No preference shall be given by any regulation of commerce or revenue to the ports of one state over those of another; nor shall vessels bound to or from one state be obliged to enter, clear, or pay duties in another.

Cooley v. Wardens of Philadelphia, 12 How. 299; Pennsylvania v. Wheeling Bridge, 18 How. 421; Munn v. Illinois, 94 U. S. 113; Packet Co. v. St. Louis, 100 U. S. 413; Packet Co. v. Catlettsburg, 105 U. S. 559; Morgan v. Board of Health, 118 U. S. 455.

⁷ No money shall be drawn from the treasury but in consequence of appropriations made by law, and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

⁸ No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state.

SECTION 10. ¹ No state shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cr. 87; New Jersey v. Wilson, 7 Cr. 164; Sturges v. Crowninshield, 4 Wheat. 122; McMillan v. McNeill, 4 Wheat. 209; Dartmouth v. Woodward, 4 Wheat. 518; Owings

v. Speed, 5 Wheat. 420; Farmers' Bank v. Smith, 6 Wheat. 131; Green v. Biddle, 8 Wheat. 1; Ogden v. Saunders, 12 Wheat. 213; Mason v. Halle, 12 Wheat. 370; Satterlee v. Matthewson, 2 Pet. 380; Hart v. Lamphire, 3 Pet. 280; Craig v. Missouri, 4 Pet. 410; Providence Bank v. Billings, 4 Pet. 514; Byrne v. Missouri, 8 Pet. 40; Watson v. Mercer, 8 Pet. 88; Mumma v. Potomac Co., 8 Pet. 281; Beers v. Haughton, 9 Pet. 329; Briscoe v. Bank of Kentucky, 11 Pet. 257; Charles Bridge v. Warren Bridge, 11 Pet. 420; Armstrong v. Athens Co., 16 Pet. 281; Bronson v. Kinzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; Gordon v. Tax Court, 3 How. 133; Maryland v. B. & O. R. Co., 3 How. 534; Nell v. Ohio, 3 How. 720; Cook v. Moffat, 5 How. 295; Planters' Bank v. Sharp, 6 How. 301; West Bridge v. Dix, 6 How. 507; Crawford v. Bank of Mobile, 7 How. 279; Woodruff v. Trapnall, 10 How. 190; Paup v. Drew, 10 How. 218; Baltimore R. Co. v. Nesbitt, 10 How. 395; Butler v. Pennsylvania, 10 How. 402; Darrington v. Bank of Alabama, 13 How. 12; Richmond, etc. R. Co. v. Louise R. Co., 13 How. 71; Vincennes University v. Indiana, 14 How. 268; Curran v. Arkansas, 15 How. 304; Bank of Ohio v. Knoop, 16 How. 369; Carpenter v. Pennsylvania, 17 How. 456; Dodge v. Woolsey, 18 How. 331; Beers v. Arkansas, 20 How. 527; Aspinwall v. County of Daviess, 22 How. 364; Christ Church v. County of Philadelphia, 24 How. 300; Howard v. Bugbee, 24 How. 461; Jefferson Bank v. Skelly, 1 Black, 436; Franklin Bank v. Ohio, 1 Black, 474; Wabash Canal Co. v. Beers, 2 Black, 448; Gilman v. Sheboygan, 2 Black, 510; Bridge Proprietors v. Hoboken Co., 1 Wall. 116; Hawthorne v. Calef, 2 Wall. 10; Binghamton Bridge, 3 Wall. 51; Turnpike Co. v. State, 3 Wall. 210; Locke v. New Orleans, 4 Wall. 172; Railroad Co. v. Rock, 4 Wall. 177; Cummings v. Missouri, 4 Wall. 277; Ex parte Garland, 4 Wall. 333; Von Hoffman v. Quincy, 4 Wall. 535; Mulligan v. Corbin, 7 Wall. 487; Furman v. Nichol, 8 Wall. 44; Home v. Rouse, 8 Wall. 430; Washington University v. Rouse, 8 Wall. 439; Butz v. Muscatine, 8 Wall. 575; Drehman v. Stifle, 8 Wall. 595; Hepburn v. Griswold, 8 Wall. 603; Gut v. State, 9 Wall. 35; Railroad Co. v. McClure, 10 Wall. 511; Parker v. Davis, 12 Wall. 457; Curtis v. Whiting, 13 Wall. 68; Pennsylvania College Cases, 13 Wall. 190; Wilmington R. Co. v. Reid, 13 Wall. 264; Salt Co. v. East Saginaw, 13 Wall. 373; White v. Hart, 13 Wall. 646; Osborn v. Nicholson, 13 Wall. 654; Railroad Co. v. Johnson, 15 Wall. 195; State Tax on Foreign-held Bonds, 15 Wall. 300; Tomlinson v. Jessup, 15 Wall. 454; Tomlinson v. Branch, 15 Wall. 460; Miller v. State, 15 Wall. 478; Holyoke Co. v. Lyman, 15 Wall. 500; Gunn v. Barry, 15 Wall. 610; Humphrey v. Pegues, 16 Wall. 244; Walker v. Whitehead, 16 Wall. 314; Sohn v. Watterson, 17 Wall. 596; Barings v. Dabney, 19 Wall. 1; Head v. University, 19 Wall. 526; Pacific R. Co. v. Maguire, 20 Wall. 36; Garrison v. City of New York, 21 Wall. 196; Ochiltree v. Railroad Co., 21 Wall. 249; Wilmington, etc. R. Co. v. King, 91 U. S. 3; County of Moultrie v. Rockingham Bank, 92 U. S. 631; Home Co. v. Augusta, 93 U. S. 116; West Wisconsin R. Co. v. Supervisors, 93 U. S. 595; Murray v. Charleston, 96 U. S. 432; Edwards v. Kearzey, 96 U. S. 595; Keith v. Clark, 97 U. S. 454; Rail-

road Co. v. Georgia, 98 U. S. 359; Railroad Co. v. Tennessee, 101 U. S. 337; Wright v. Nagle, 101 U. S. 791; Stone v. Mississippi, 101 U. S. 814; Railroad Co. v. Alabama, 101 U. S. 832; Louisiana v. New Orleans, 101 U. S. 203; Hall v. Wisconsin, 103 U. S. 5; Pennyman's Case, 103 U. S. 714; Guaranty Co. v. Board of Liquidation, 105 U. S. 622; Greenwood v. Freight Co., 105 U. S. 13; Kring v. Missouri, 107 U. S. 221; Louisiana v. New Orleans, 109 U. S. 285; Gilfillan v. Union Canal Co., 109 U. S. 401; Nelson v. St. Martin's Parish, 111 U. S. 716; Virginia Coupon Cases, 114 U. S. 270; Amy v. Shelby Co., 114 U. S. 387; Effinger v. Kenney, 115 U. S. 566; New Orleans Gas. Co. v. La. Light Co., 115 U. S. 650; New Orleans Water-works v. Rivers, 115 U. S. 674; Louisville Gas Co. v. Citizens' Gas Co., 115 U. S. 683; Fisk v. Jefferson Police Jury, 116 U. S. 131; Stone v. Farmers' Co., 116 U. S. 307; Stone v. Illinois Cent. R. Co., 116 U. S. 347; Royall v. Virginia, 116 U. S. 572; St. Tammany Water-works v. New Orleans Water-works, 120 U. S. 64; Church v. Kelsey, 121 U. S. 282; Lehigh Water Co. v. Easton, 121 U. S. 388; Selbert v. Lewis, 122 U. S. 284; New Orleans Water-works v. La. Sugar Refining Co., 125 U. S. 18; Maynard v. Hill, 125 U. S. 140; Jaehne v. New York, 128 U. S. 189; Denny v. Bennett, 128 U. S. 489; Chinese Exclusion Case, 130 U. S. 588; Williamson v. New Jersey, 130 U. S. 189; Hunt v. Hunt, 131 U. S. clxv; Freeland v. Williams, 131 U. S. 405; Crenshaw v. U. S. 134, U. S. 99; McGahey v. Virginia, 135 U. S. 662; Wheeler v. Jackson, 137 U. S. 245; Holden v. Minnesota, 137 U. S. 483; Sioux City R. Co. v. Sioux City, 138 U. S. 98; Essex Public Road Board v. Skinkle, 140 U. S. 334; Stein v. Blenville Water Supply Co., 141 U. S. 67; New York v. Squire, 145 U. S. 175; Brown v. Smart, 145 U. S. 454; Morley v. Railway Co., 146 U. S. 162; Hamilton Co. v. Hamilton City, 146 U. S. 258; Schurz v. Cook, 148 U. S. 397; Railroad Co. v. Bristol, 151 U. S. 556; Bryan v. Board of Education, 151 U. S. 639; Railroad Co. v. Pennsylvania, 153 U. S. 628; Railroad Co. v. Louisiana, 157 U. S. 219; Bergeman v. Boeker, 157 U. S. 655; Bank v. Tennessee, 161 U. S. 134; Baltzer v. North Carolina, 161 U. S. 240; Hanford v. Davies, 163 U. S. 273; Railway Co. v. Mathews, 165 U. S. 1; Water Power Co. v. Water Commissioners, 168 U. S. 349; Douglas v. Kentucky, 168 U. S. 488; Hawker v. New York, 170 U. S. 189; Houston & Texas Central Ry. Co. v. Texas, 170 U. S. 243; Railroad Co. v. Jacobson, 179 U. S. 280; Mallett v. North Carolina, 181 U. S. 589.

² No state shall, without the consent of the congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts, laid by any state on imports or exports, shall be for the use of the treasury of the United States; and all such laws shall be subject to the revision and control of the congress.

McCulloch v. Maryland, 4 Wheat. 316; Gibbons v. Ogden, 9 Wheat. 1; Brown v. Maryland, 12 Wheat. 419; Mager v. Grima et al., 8 How. 490;

Cooley v. Wardens of Philadelphia, 12 How. 299; *Almy v. California*, 24 How. 169; *License Tax Cases*, 5 Wall. 462; *Crandall v. Nevada*, 6 Wall. 35; *Waring v. Mayor*, 8 Wall. 110; *Woodruff v. Parham*, 8 Wall. 123; *Hinson v. Lott*, 8 Wall. 148; *State Tonnage Tax Cases*, 12 Wall. 204; *State Tax on Railway Receipts*, 15 Wall. 284; *Inman Co. v. Tinker*, 94 U. S. 238; *Cook v. Pennsylvania*, 97 U. S. 566; *Packet Co. v. Keokuk*, 95 U. S. 80; *People v. Compagnie*, 107 U. S. 59; *Brown v. Houston*, 114 U. S. 622.

³ No state shall, without the consent of congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another state, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.

Green v. Biddle, 8 Wheat. 1; *Poole et al. v. Fleeger*, 11 Pet. 185; *Cooley v. Wardens of Philadelphia*, 12 How. 299; *Peete v. Morgan*, 19 Wall. 581; *Cannon v. New Orleans*, 20 Wall. 577; *Inman Co. v. Tinker*, 94 U. S. 238; *Packet Co. v. St. Louis*, 100 U. S. 423; *Packet Co. v. Keokuk*, 95 U. S. 80; *Vicksburg v. Tobin*, 100 U. S. 430; *Packet Co. v. Catlettsburg*, 105 U. S. 559; *Morgan Co. v. Board of Health*, 118 U. S. 455; *Ouachita Co. v. Aiken*, 121 U. S. 444; *Huse v. Glover*, 119 U. S. 543.

ARTICLE II.

SECTION 1. ¹ The executive power shall be vested in a president of the United States of America. He shall hold his office during the term of four years, and, together with the vice-president, chosen for the same term, be elected as follows:

² Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the state may be entitled in the congress; but no senator or representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

Chisholm v. Georgia, 2 Dall. 419; *Leitensdorfer v. Webb*, 20 How. 165; *Ex parte Siebold*, 100 U. S. 271; *McPherson v. Blocker*, 146 U. S. 1.

[The electors shall meet in their respective states, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same state with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The president of the senate shall, in the presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the president, if such number be a majority of the

whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the house of representatives shall immediately choose by ballot one of them for president; and if no person have a majority, then from the five highest on the list the said house shall in like manner choose the president. But in choosing the president, the votes shall be taken by states, the representation from each state having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. In every case, after the choice of the president, the person having the greatest number of votes of the electors shall be the vice-president. But if there should remain two or more who have equal votes, the senate shall choose from them by ballot the vice-president.]

This clause has been superseded by the twelfth amendment.

³ The congress may determine the time of choosing the electors, and the day on which they shall give their votes, which day shall be the same throughout the United States.

⁴ No person except a natural born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president; neither shall any person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

English v. Sailors' Snug Harbor, 3 Pet. 99..

⁵ In case of the removal of the president from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the vice-president; and the congress may, by law, provide for the case of removal, death, resignation, or inability both of the president and vice-president, declaring what officer shall then act as president; and such officer shall act accordingly until the disability be removed or a president shall be elected.

⁶ The president shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected; and he shall not receive within that period any other emolument from the United States, or any of them.

⁷ Before he enter on the execution of his office, he shall take the following oath or affirmation: "I do solemnly swear (or affirm) that I will faithfully execute the office of president of the United States, and will, to the best of my ability, preserve, protect, and defend the constitution of the United States."

SECTION 2. ¹The president shall be commander-in-chief of the army and navy of the United States, and of the militia of the several states when called into the actual service of the United States. He may require the opinion, in writing, of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

United States v. Wilson, 7 Pet. 150; Ex parte Wells, 18 How. 307; Ex parte Garland, 4 Wall. 333; Armstrong's Foundry, 6 Wall. 766; The Grape Shot, 9 Wall. 129; United States v. Padelford, 9 Wall. 542; United States v. Klein, 13 Wall. 128; Armstrong v. United States, 13 Wall. 152; Pargoud v. United States, 13 Wall. 156; Hamilton v. Dillin, 21 Wall. 73; Mechanics' Bank v. Union Bank, 22 Wall. 276; Lamar v. Browne, 92 U. S. 187; Wallach v. Van Renswick, 92 U. S. 202.

² He shall have power, by and with the advice and consent of the senate, to make treaties, provided two-thirds of the senators present concur; and he shall nominate, and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers and consuls, judges of the supreme court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law; but the congress may by law vest the appointment of such inferior officers, as they think proper, in the president alone, in the courts of law, or in the heads of departments.

Ware v. Hylton, 3 Dall. 199; Marbury v. Madison, 1 Cr. 137; United States v. Kirkpatrick, 9 Wheat. 720; American Co. v. Canter, 1 Pet. 511; Foster v. Neilson, 2 Pet. 253; Cherokee Nation v. Georgia, 5 Pet. 1; Patterson v. Gwinn, 5 Pet. 233; Worcester v. Georgia, 6 Pet. 515; New Orleans v. De Armas et al., 9 Pet. 224; Holden v. Joy, 17 Wall. 211.

³ The president shall have power to fill up all vacancies that may happen during the recess of the senate, by granting commissions which shall expire at the end of their next session.

United States v. Kirkpatrick, 9 Wheat. 720.

SECTION 3. He shall from time to time give to the congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient; he may, on extraordinary occasions, convene both houses, or either of them, and in case of disagreement between them, with respect to the time of adjournment, he may ad-

journal them to such time as he shall think proper; he shall receive ambassadors and other public ministers; he shall take care that the laws be faithfully executed, and shall commission all the officers of the United States.

Marbury v. Madison, 1 Cr. 137; *Kendall v. United States*, 12 Pet. 524; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, President, 4 Wall. 475; *Stewart v. Kahn*, 11 Wall. 493; *Ex parte Neagle*, 135 U. S. 1.

SECTION 4. The president, vice-president, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

ARTICLE III.

SECTION 1. The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation which shall not be diminished during their continuance in office.

Chisholm v. Georgia, 2 Dall. 419; *Stuart v. Laird*, 1 Cr. 299; *United States v. Peters*, 5 Cr. 115; *Cohens v. Virginia*, 6 Cr. 264; *Martin v. Hunter*, 1 Wheat. 304; *Osborn v. United States Bank*, 9 Wheat. 738; *Benner v. Porter*, 9 How. 235; *United States v. Ritchie*, 17 How. 525; *Murray v. Hoboken Co.*, 18 How. 272; *Ex parte Vallandigham*, 1 Wall. 243; *Ames v. Kansas*, 111 U. S. 449.

SECTION 2. ¹ The judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states; between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

Hayburn's Case (note), 2 Dall. 410; *Chisholm v. Georgia*, 2 Dall. 419; *Glass v. Sloop Betsy*, 3 Dall. 6; *United States v. La Vengeance*, 3 Dall. 297; *Hollingsworth v. Virginia*, 3 Dall. 378; *Mossman v. Higginson*, 4 Dall. 12; *Marbury v. Madison*, 1 Cr. 137; *Hepburn v.*

Ellzey, 2 Cr. 444; United States v. Moore, 3 Cr. 159; Strawbridge v. Curtiss, 3 Cr. 267; *Ex parte* Bollman, 4 Cr. 75; Rose v. Himely, 4 Cr. 241; Chappedelaine v. Dechenaux, 4 Cr. 305; Hope Co. v. Boardman, 5 Cr. 57; Bank United States v. Devaux, 5 Cr. 61; Hodgson v. Bowerbank, 5 Cr. 303; Owings v. Norwood, 5 Cr. 344; Dourousseau v. United States, 6 Cr. 307; United States v. Hudson, 7 Cr. 32; Martin v. Hunter, 1 Wheat. 304; Colson v. Lewis, 2 Wheat. 377; United States v. Bevans, 3 Wheat. 336; Cohens v. Virginia, 6 Wheat. 264; *Ex parte* Kearney, 7 Wheat. 38; Matthews v. Zane, 7 Wheat. 164; Osborn v. United States Bank, 9 Wheat. 738; United States v. Ortega, 11 Wheat. 467; American Co. v. Canter, 1 Pet. 511; Jackson v. Twentyman, 2 Pet. 136; Cherokee Nation v. Georgia, 5 Pet. 1; New Jersey v. New York, 5 Pet. 283; Davis v. Packard, 6 Pet. 41; United States v. Arredondo, 6 Pet. 691; Davis v. Packard, 7 Pet. 276; Breedlove v. Nickolet, 7 Pet. 413; Brown v. Keene, 8 Pet. 112; Davis v. Packard, 8 Pet. 312; New Orleans v. De Armas, 9 Pet. 224; Rhode Island v. Massachusetts, 12 Pet. 657; Bank of Augusta v. Earle, 13 Pet. 519; Bank of Vicksburg v. Slocumb, 14 Pet. 60; Suydam v. Broadnax, 14 Pet. 67; Prigg v. Pennsylvania, 16 Pet. 530; L., C. & C. Ry. Co. v. Letson, 2 How. 497; Cary v. Curtis, 3 How. 236; Warring v. Clark, 5 How. 441; Luther v. Borden, 7 How. 1; Sheldon v. Sill, 8 How. 441; Genesee Chief v. Fitzhugh, 12 How. 443; Fretz v. Ball, 12 How. 466; Neves v. Scott, 13 How. 268; Pennsylvania v. Wheeling, Bridge, 13 How. 518; Marshall v. Baltimore & Ohio R. Co., 16 How. 314; United States v. Guthrie, 17 How. 284; Smith v. Maryland, 18 How. 71; Jones v. League, 18 How. 76; Murray v. Hoboken Co., 18 How. 272; Hyde v. Stone, 20 How. 170; Irvine v. Marshall, 20 How. 558; Fenn v. Holmes, 21 How. 481; Morewood v. Enequist, 23 How. 491; Kentucky v. Dennison, 24 How. 66; O. & M. R. Co. v. Wheeler, 1 Black, 286; Steamer St. Lawrence, 1 Black, 522; Propellor Commerce, 1 Black, 574; *Ex parte* Vallandigham, 1 Wall. 243; *Ex parte* Milligan, 4 Wall. 1; Moses Taylor, 4 Wall. 411; Mississippi v. Johnson, 4 Wall. 475; Hine v. Trevor, 4 Wall. 555; Philadelphia v. Collector, 5 Wall. 720; Georgia v. Stanton, 6 Wall. 50; Payne v. Hook, 7 Wall. 425; Alicia, 7 Wall. 571; *Ex parte* Yerger, 8 Wall. 85; Insurance Co. v. Dunham, 11 Wall. 1; Virginia v. West Virginia, 11 Wall. 39; Coal Co. v. Blatchford, 11 Wall. 172; Railway Co. v. Whitton, 13 Wall. 270; Tarble's Case, 13 Wall. 397; Blyew v. United States, 13 Wall. 581; Davis v. Gray, 16 Wall. 203; Sewing Machine Cos., 18 Wall. 353; Insurance Co. v. Morse, 20 Wall. 445; Vannevar v. Bryant, 21 Wall. 41; Lottawanna, 21 Wall. 558; Gaines v. Fuentes, 92 U. S. 10; Miller v. Dows, 94 U. S. 444; Doyle v. Continental Co., 94 U. S. 535; Tennessee v. Davis, 100 U. S. 257; Baldwin v. Franks, 120 U. S. 678; Barron v. Burnside, 121 U. S. 186; St. L., I. M. & S. Ry. Co. v. Vickers, 122 U. S. 360; Brooks v. Missouri, 124 U. S. 384; New Orleans Waterworks v. Louisiana Sugar Ref. Co., 125 U. S. 18; Spencer v. Merchant, 125 U. S. 345; Dale Tile Mfg. Co. v. Hyatt, 125 U. S. 46; Felix v. Scharnweber, 125 U. S. 54; H. & St. J. R. Co. v. Missouri River Co., 125 U. S. 260; Kreiger v. Shelby R. Co., 125 U. S. 39; Craig v. Leitendorfer, 127 U. S.

764; *Jones v. Craig*, 127 U. S. 213; *Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265; *United States v. Beebe*, 127 U. S. 338; *Chinese Exclusion Case*, 130 U. S. 581; *United States v. Texas*, 143 U. S. 621; *Louisiana v. Texas*, 176 U. S. 1.

² In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the congress shall make.

Chisholm v. Georgia, 2 Dall. 419; *Wiscart v. Dauchy*, 3 Dall. 321; *Marbury v. Madison*, 1 Cr. 137; *Durousseau v. United States*, 6 Cr. 307; *Martin v. Hunter*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 234; *Ex parte Kearney*, 7 Wheat. 38; *Wayman v. Southard*, 10 Wheat. 1; *Bank of United States v. Halstead*, 10 Wheat. 51; *United States v. Ortega*, 11 Wheat. 467; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Ex parte Crane*, 5 Pet. 189; *New Jersey v. New York*, 5 Pet. 283; *Sibbald v. United States*, 12 Pet. 488; *Rhode Island v. Massachusetts*, 12 Pet. 657; *Pennsylvania v. Wheeling Bridge*, 13 How. 518; *In re Kaine*, 14 How. 103; *Ableman v. Booth*, 21 How. 506; *Freeborn v. Smith*, 2 Wall. 160; *Ex parte McCardle*, 6 Wall. 318; *Ex parte McCardle*, 7 Wall. 506; *Ex parte Yerger*, 8 Wall. 85; *Lucy*, 8 Wall. 307; *Justices v. Murray*, 9 Wall. 274; *Pennsylvania v. Quicksilver Co.*, 10 Wall. 553; *Murdock v. Memphis*, 20 Wall. 590; *Bors v. Preston*, 111 U. S. 252; *Ames v. Kansas*, 111 U. S. 449.

³ The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may, by law, have directed.

Ex parte Milligan, 4 Wall. 2; *Cook v. United States*, 138 U. S. 157.

SECTION 3. ¹ Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

United States v. Insurgents, 2 Dall. 335; *United States v. Mitchell*, 2 Dall. 348; *Ex parte Bollman*, 4 Cr. 75; *United States v. Burr*, 4 Cr. 469.

² The congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted.

Bigelow v. Forest, 9 Wall. 339; *Day v. Micou*, 18 Wall. 156; *Ex parte Lange*, 18 Wall. 163; *Wallach v. Van Renswick*, 92 U. S. 202.

ARTICLE IV.

SECTION 1. Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Mills v. Duryee, 7 Cr. 481; Hampton v. McConnel, 3 Wheat. 234; Mayhew v. Thatcher, 6 Wheat. 129; Darby v. Mayer, 10 Wheat. 465; United States v. Amedy, 11 Wheat. 392; Caldwell v. Carrington, 9 Pet. 86; M'Elmoyle v. Cohen, 13 Pet. 312; Bank of Augusta v. Earle, 13 Pet. 519; Bank of Alabama v. Dalton, 9 How. 522; D'Arcy v. Ketchum, 11 How. 165; Christmas v. Russell, 5 Wall. 290; Green v. Van Buskirk, 7 Wall. 139; Paul v. Virginia, 8 Wall. 168; Public Works v. Columbia College, 17 Wall. 521; Thompson v. Whitman, 18 Wall. 457; Bonaparte v. Tax Court, 104 U. S. 592; Hanley v. Donoghue, 116 U. S. 1; Renaud v. Abbott, 116 U. S. 277; C. & A. R. Co. v. Wiggins Ferry Co., 119 U. S. 615; Cole v. Cunningham, 133 U. S. 107; Manning v. French, 133 U. S. 186; Blount v. Walker, 134 U. S. 607; Simmons v. Seals, 138 U. S. 439; Reynolds v. Stocklin, 140 U. S. 254; Carpenter v. Strange, 141 U. S. 37; Huntington v. Attrill, 146 U. S. 657; Laing v. Rigney, 160 U. S. 531; Railway Co. v. Sturm, 174 U. S. 710; Thormann v. Frame, 176 U. S. 350.

SECTION 2. ¹ The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Bank of United States v. Devereux, 5 Cr. 61; Gassies v. Ballou, 6 Pet. 761; Rhode Island v. Massachusetts, 12 Pet. 657; Bank of Augusta v. Earle, 13 Pet. 519; Moore v. Illinois, 14 How. 13; Conner v. Elliot, 18 How. 591; Dred Scott v. Sanford, 19 How. 393; Crandall v. Nevada, 6 Wall. 35; Woodruff v. Parham, 8 Wall. 123; Paul v. Virginia, 8 Wall. 168; Downham v. Alexandria, 10 Wall. 173; Liverpool Co. v. Massachusetts, 10 Wall. 566; Ward v. Maryland, 12 Wall. 418; Slaughter-house Cases, 16 Wall. 36; Bradwell v. State, 16 Wall. 130; Chemung Bank v. Lowery, 93 U. S. 72; McCready v. Virginia, 94 U. S. 391; Brown v. Houston, 114 U. S. 622; Pembina Mining Co. v. Pennsylvania, 125 U. S. 181; Kimmish v. Ball, 129 U. S. 217; Blake v. McClung, 172 U. S. 239.

² A person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime.

Holmes v. Jennison, 14 Pet. 540; Kentucky v. Dennison, 24 How. 66; Taylor v. Tainter, 16 Wall. 366; Lascelles v. Georgia, 148 U. S. 537.

³ No person held to service or labor in one state, under the laws thereof, escaping into another, shall, in consequence of

any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Prigg v. Pennsylvania, 16 Pet. 539; *Jones v. Van Zandt*, 5 How. 215; *Strader v. Graham*, 10 How. 82; *Moore v. Illinois*, 14 How. 13; *Dred Scott v. Sanford*, 19 How. 393; *Ableman v. Booth*, 21 How. 506; *Callan v. Wilson*, 127 U. S. 540; *Railway Co. v. Alabama*, 128 U. S. 96.

SECTION 3. ¹ New states may be admitted by the congress into this Union; but no new state shall be formed or erected within the jurisdiction of any other state, nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the congress.

American Insurance Co. v. Canter, 1 Pet. 511; *Pollard v. Hagan*, 3 How. 212; *Cross v. Harrison*, 16 How. 164.

² The congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this constitution shall be so construed as to prejudice any claims of the United States or of any particular state.

McCulloch v. Maryland, 4 Wheat. 316; *American Ins. Co. v. Canter*, 1 Pet. 511; *United States v. Gratiot*, 14 Pet. 526; *United States v. Rogers*, 4 How. 567; *Cross v. Harrison*, 16 How. 164; *Muckey v. Coxe*, 18 How. 100; *Gibson v. Chouteau*, 13 Wall. 92; *Clinton v. Englebert*, 13 Wall. 434; *Beall v. New Mexico*, 16 Wall. 535.

SECTION 4. The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened), against domestic violence.

Luther v. Borden, 7 How. 1; *Texas v. White*, 7 Wall. 700.

ARTICLE V.

The congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this constitution, or, on the application of the legislatures of two-thirds of the several states, shall call a convention for proposing amendments; which, in either case, shall be valid to all intents and purposes, as part of this constitution, when ratified by the legislatures of three-fourths of the several states, or by conventions in three-fourths thereof, as the one or the other mode of ratification may

be proposed by the congress; *Provided*, That no amendment which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no state, without its consent, shall be deprived of its equal suffrage in the senate.

Hollingsworth v. Virginia, 3 Dall. 378.

ARTICLE VI.

¹ All debts contracted and engagements entered into, before the adoption of this constitution, shall be as valid against the United States under this constitution, as under the confederation.

² This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.

Hayburn's Case, 2 Dall. 409; Ware v. Hylton, 3 Dall. 199; Calder v. Bull, 3 Dall. 386; Marbury v. Madison, 1 Cr. 137; Chirac v. Chirac, 2 Wheat. 259; McCulloch v. Maryland, 4 Wheat. 316; Society v. New Haven, 8 Wheat. 464; Gibbons v. Ogden, 9 Wheat. 1; Foster v. Neilson, 2 Pet. 253; Buckner v. Finley, 2 Pet. 586; Worcester v. Georgia, 6 Pet. 515; Kennett v. Chambers, 14 How. 38; Lodge v. Woolsey, 18 How. 331; New York v. Dibble, 21 How. 366; Ableman v. Booth, 21 How. 506; Sinnot v. Davenport, 22 How. 227; Foster v. Davenport, 22 How. 244; Haver v. Yaker, 9 Wall. 32; Whitney v. Robertson, 124 U. S. 190.

³ The senators and representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation. to support this constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

Ex parte Garland, 4 Wall. 333.

ARTICLE VII.

The ratification of the conventions of nine states shall be sufficient for the establishment of this constitution between the states so ratifying the same.

DONE in convention by the unanimous consent of the states present the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven and of the independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.

Go WASHINGTON—
Presidt. and Deputy from Virginia.

NEW HAMPSHIRE.

JOHN LANGDON,

NICHOLAS GILMAN.

MASSACHUSETTS.

NATHANIEL GORHAM,

RUFUS KING.

CONNECTICUT.

WM. SAM'L JOHNSON,

ROGER SHERMAN.

NEW YORK.

ALEXANDER HAMILTON.

NEW JERSEY.

WIL: LIVINGSTON,

DAVID BREARLEY,

WM. PATTERSON,

JONA DAYTON.

PENNSYLVANIA.

B. FRANKLIN,

THOMAS MIFFLIN,

ROBT MORRIS,

GEO. CLYMER,

THO. FITSIMONS,

JARED INGERSOLL,

JAMES WILSON,

GOUV. MORRIS.

DELAWARE.

GEO: READ,

GUNNING BEDFORD, JUN'R.

JOHN DICKINSON,

RICHARD BASSETT.

JACO: BROOM,

MARYLAND.

JAMES M'HENRY,

DAN: OF ST. THOS. JENIFER.

DANL CARROLL,

VIRGINIA.

JOHN BLAIR,

JAMES MADISON, JR.

NORTH CAROLINA.

WM. BLOUNT,

RICH'D DOBBS SPAIGHT.

HU. WILLIAMSON,

SOUTH CAROLINA.

J. RUTLEDGE,
CHARLES PINCKNEY,
PIERCE BUTLER,

CHARLES COTESWORTH PINCK-
NEY,

GEORGIA.

WILLIAM FEW,

ABR. BALDWIN.

Attest:

WILLIAM JACKSON, *Secretary*.

ARTICLES IN ADDITION TO, AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA, PROPOSED BY CONGRESS, AND RATIFIED BY THE LEGISLATURES OF THE SEVERAL STATES PURSUANT TO THE FIFTH ARTICLE OF THE ORIGINAL CONSTITUTION.

[ARTICLE I.]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

Terret v. Taylor, 9 Cr. 43; Vidal v. Girard, 2 How. 127; Ex parte Garland, 4 Wall. 333; United States v. Cruikshank, 92 U. S. 542; Reynolds v. United States, 98 U. S. 145; Davis v. Beason, 133 U. S. 333; Ellenbecker v. Plymouth County, 134 U. S. 31; In re Rapier, 143 U. S. 110; Bradfield v. Roberts, 175 U. S. 291; United States v. Williams, 194 U. S. 279.

[ARTICLE II.]

A well-regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.

Presser v. Illinois, 116 U. S. 252; Ellenbecker v. Plymouth County, 134 U. S. 31.

[ARTICLE III.]

No soldier shall, in time of peace, be quartered in any house, without the consent of the owner, nor in time of war but in a manner to be prescribed by law.

Ellenbecker v. Plymouth County, 134 U. S. 31.

[ARTICLE IV.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures

shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Smith v. Maryland, 18 How. 71; Murray v. Hoboken Co., 18 How. 272; *Ex parte* Milligan, 4 Wall. 2; Boyd v. United States, 116 U. S. 616; Ellenbecker v. Plymouth County, 134 U. S. 31; Interstate Commerce Com'n v. Baird, 194 U. S. 25.

[ARTICLE V.]

No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation.

United States v. Perez, 9 Wheat. 579; Barron v. Baltimore, 7 Pet. 243; Fox v. Ohio, 5 How. 410; West Bridge v. Dix, 6 How. 507; Mitchell v. Harmony, 13 How. 115; Moore v. Illinois, 14 How. 13; Murray v. Hoboken Co., 18 How. 272; Dynes v. Hoover, 20 How. 65; Withers v. Buckley, 20 How. 84; Gilman v. Sheboygan, 2 Black. 510; *Ex parte* Milligan, 4 Wall. 2; Twitchell v. Commonwealth, 7 Wall. 321; Hepburn v. Griswold, 8 Wall. 603; Miller v. United States, 11 Wall. 268; Legal Tender Cases, 12 Wall. 457; Pumpelly v. Green Bay Co., 13 Wall. 166; Osborn v. Nicholson, 13 Wall. 654; *Ex parte* Lange, 18 Wall. 163; Kohl v. United States, 91 U. S. 367; Cole v. LaGrange, 113 U. S. 1; *Ex parte* Wilson, 114 U. S. 417; Brown v. Grant, 116 U. S. 207; Boyd v. United States, 116 U. S. 616; Makin v. United States, 117 U. S. 348; *Ex parte* Bain, 121 U. S. 1; Parkinson v. United States, 121 U. S. 281; Spies v. Illinois, 123 U. S. 131; Sands v. Manistee River Co., 123 U. S. 288; Mugar v. Kansas, 123 U. S. 623; Great Falls Co. v. Attorney-General, 124 U. S. 581; United States v. DeWalt, 128 U. S. 393; Huling v. Kaw Valley Co., 130 U. S. 559; Freeland v. Williams, 131 U. S. 405; Suggs v. Thornton, 132 U. S. 524; Ellenbecker v. Plymouth County, 134 U. S. 31; New Orleans v. New Orleans Waterworks, 142 U. S. 79; Counselman v. Hitchcock, 142 U. S. 547; Horn Co. v. New York, 143 U. S. 305; Shoemaker v. United States, 147 U. S. 282; Thorington v. Montgomery, 147 U. S. 490; Monongahela Navigation Co. v. United States, 148 U. S. 312; Johnson v. Sayer, 158 U. S. 109; Bauman v. Ross, 167 U. S. 548; Norwood v. Baker, 172 U. S. 269; Scranton v. Wheeler, 179 U. S. 141.

[ARTICLE VI.]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States v. Coolidge, 1 Wheat. 415; *Ex parte* Kearney, 7 Wheat. 38; United States v. Mills, 7 Pet. 142; Barron v. Baltimore, 7 Pet. 243; Fox v. Ohio, 5 How. 410; Withers v. Buckley, 20 How. 84; *Ex parte* Milligan, 4 Wall. 2; Twitchell v. Commonwealth, 7 Wall. 321; Miller v. United States, 11 Wall. 268; United States v. Cook, 17 Wall. 168; United States v. Cruikshank, 92 U. S. 542; Spies v. Illinois, 123 U. S. 131; Ellenberger v. Plymouth County, 134 U. S. 31; Thompson v. Utah, 170 U. S. 343; Motes v. United States, 178 U. S. 458.

[ARTICLE VII.]

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

United States v. La Vengeance, 3 Dall. 297; Bank of Columbia v. Oakley, 4 Wheat. 235; Parsons v. Bedford, 3 Pet. 433; Livingston v. Moore, 7 Pet. 469; Webster v. Reid, 11 How. 437; State of Pennsylvania v. Wheeling Bridge, 13 How. 518; Justices v. Murray, 9 Wall. 274; Edwards v. Elliott, 21 Wall. 532; Pearson v. Yewdall, 95 U. S. 294; McElrath v. United States, 102 U. S. 426; Callan v. Wilson, 127 U. S. 540; Ark. Valley Co. v. Mann, 130 U. S. 69; Ellenbecker v. Plymouth County, 134 U. S. 31; Scott v. Neely, 140 U. S. 106; Cates v. Allen, 149 U. S. 451; Coughran v. Bigelow, 164 U. S. 301.

[ARTICLE VIII.]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Puryear v. Commonwealth, 5 Wall. 475; Ellenbecker v. Plymouth County, 134 U. S. 31; McElvaine v. Brush, 142 U. S. 155.

[ARTICLE IX.]

The enumeration in the constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Livingston v. Moore, 7 Pet. 469.

[ARTICLE X.]

The powers not delegated to the United States by the constitution, nor prohibited by it to the States, are reserved to the states respectively, or to the people.

Chisholm v. Georgia, 2 Dall. 419; *Hollingsworth v. Virginia*, 3 Dall. 378; *Martin v. Hunter*, 1 Wheat. 304; *McCulloch v. Maryland*, 4 Wheat. 316; *Anderson v. Dunn*, 6 Wheat. 204; *Cohens v. Virginia*, 6 Wheat. 264; *Osborn v. United States Bank*, 9 Wheat. 738; *Buehler v. Finley*, 2 Pet. 586; *Ableman v. Booth*, 21 How. 506; *Collector v. Day*, 11 Wall. 113; *Claffin v. Houseman*, 93 U. S. 130; *Inman Co. v. Tinker*, 94 U. S. 238; *W. U. Tel. Co. v. Pendleton*, 122 U. S. 347; *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465; *Mahon v. Justice*, 127 U. S. 700.

ARTICLE XI.

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

Georgia v. Brailsford, 2 Dall. 402; *Chisholm v. Georgia*, 2 Dall. 419; *Hollingsworth v. Virginia*, 3 Dall. 378; *Cohen v. Virginia*, 6 Wheat. 263; *Osborn v. United States Bank*, 9 Wheat. 738; *United States v. Planters' Bank*, 9 Wheat. 904; *Georgia v. Juan Madrazo*, 1 Pet. 110; *Cherokee Nation v. Georgia*, 5 Pet. 1; *Briscoe v. Bank of Kentucky*, 11 Pet. 257; *Curran v. Arkansas*, 15 How. 304; *New Hampshire v. Louisiana*, 108 U. S. 76; *Virginia Coupon Cases*, 114 U. S. 270; *Hagood v. Southern*, 117 U. S. 52; *In re Ayres*, 123 U. S. 443; *Lincoln Co. v. Luning*, 133 U. S. 529; *Hans v. Louisiana*, 134 U. S. 1; *North Carolina v. Semple*, 134 U. S. 22; *Pennoyer v. McConnaughy*, 140 U. S. 1; *Scott v. Donald*, 165 U. S. 58, 107; *Tindal v. Wesley*, 167 U. S. 204; *Smith v. Ames*, 169 U. S. 466; *Fitts v. McGhee*, 172 U. S. 516; *Smith v. Reeves*, 178 U. S. 436.

ARTICLE XII.

The electors shall meet in their respective states and vote by ballot for president and vice-president, one of whom, at least, shall not be an inhabitant of the same state with themselves; they shall name in their ballots the person voted for as president, and in distinct ballots the person voted for as vice-president, and they shall make distinct lists of all persons voted for as president, and of all persons voted for as vice-president, and of the number of votes for each, which lists they shall sign and certify, and transmit sealed to the seat of the government of the United States, directed to the president of the senate. The

president of the senate shall, in presence of the senate and house of representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes for president shall be the president, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers not exceeding three on the list of those voted for as president, the house of representatives shall choose immediately, by ballot, the president. But in choosing the president the votes shall be taken by states, the representation from each state having one vote. A quorum for this purpose shall consist of a member or members from two-thirds of the states, and a majority of all the states shall be necessary to a choice. And if the house of representatives shall not choose a president whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the vice-president shall act as president, as in case of the death or other constitutional disability of the president. The person having the greatest number of votes as vice-president shall be the vice-president, if such number be a majority of the whole number of electors appointed, and if no person have a majority, then from the two highest numbers on the list the senate shall choose the vice-president. A quorum for the purpose shall consist of two-thirds of the whole number of senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of president shall be eligible to that of vice-president of the United States.

ARTICLE XIII.

SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

SECTION 2. Congress shall have power to enforce this article by appropriate legislation.

Dred Scott v. Sanford, 19 How. 393; *White v. Hart*, 13 Wall. 646; *Osborn v. Nicholson*, 13 Wall. 654; *Slaughter-house Cases*, 16 Wall. 36; *Ex parte Virginia*, 100 U. S. 339; *Civil Rights Case*, 109 U. S. 3; *Robertson v. Bolwin*, 165 U. S. 275.

ARTICLE XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Strauder v. West Virginia, 100 U. S. 303; *Virginia v. Rives*, 100 U. S. —; *Ex parte Virginia*, 100 U. S. 339; *Missouri v. Lewis*, 101 U. S. 22; *Civil Rights Cases*, 109 U. S. 3; *Louisiana v. New Orleans*, 109 U. S. 285; *Hurtado v. California*, 110 U. S. 516; *Hagar v. Reclamation Dist.*, 111 U. S. 701; *Elk v. Wilkins*, 112 U. S. 94; *Head v. Amoskeag Mfg. Co.*, 113 U. S. 9; *Barbler v. Connolly*, 113 U. S. 27; *Provident Institution v. Jersey City*, 113 U. S. 506; *Soon Hing v. Crowley*, 113 U. S. 703; *Wurts v. Hoagland*, 114 U. S. 606; *Ky. R. R. Tax Cases*, 115 U. S. 321; *Campbell v. Holt*, 115 U. S. 620; *Presser v. Illinois*, 116 U. S. 252; *Stone v. Farmers' Co.*, 116 U. S. 307; *Arrowsmith v. Harmoning*, 118 U. S. 194; *Yick Wo v. Hopkins*, 118 U. S. 356; *Santa Clara Co. v. S. Pac. R. Co.*, 118 U. S. 394; *Phila. Fire Ass'n v. N. Y.*, 119 U. S. 110; *Schmidt v. Cobb*, 119 U. S. 286; *Baldwin v. Frank*, 119 U. S. 678; *Hayes v. Missouri*, 120 U. S. 68; *Church v. Kelsey*, 121 U. S. 282; *Pembina Co. v. Pennsylvania*, 125 U. S. 181; *Spencer v. Merchant*, 125 U. S. 345; *Dow v. Beldelman*, 125 U. S. 680; *Bank of Redemption v. Boston*, 125 U. S. 60; *Ro Bards v. Lamb*, 127 U. S. 58; *Mo. Pac. Ry. Co. v. Mackey*, 127 U. S. 205; *M. & St. L. Ry. Co. v. Herrick*, 127 U. S. 210; *Powell v. Pennsylvania*, 127 U. S. 678; *Kidd v. Pearson*, 128 U. S. 1; *N. C. etc. Ry. Co. v. Alabama*, 128 U. S. 96; *Walston v. Navin*, 128 U. S. 578; *M. & St. L. Ry. Co. v. Beckwith*, 129 U. S. 26; *Dent v. West Va.*, 129 U. S. 114; *Huling v. Kaw Valley Ry. Co.*, 130 U. S. 559; *Freeland v. Williams*, 131 U. S. 405; *Ellenbecker v. Plymouth Co.*, 134 U. S. 31; *Bell Gap R. Co. v. Pennsylvania*, 134 U. S. 232; *Home Ins. Co. v. New York*, 134 U. S. 594; *L. & N. R. Co. v. Woodson*, 134 U. S. 614; *York v. Texas*, 137 U. S. 15; *T. P. R. Co. v. S. P. R. Co.*, 137 U. S. 48; *Crowley v. Christensen*, 137 U. S. 86; *St. P., M. etc. R. Co. v. Philips*, 137 U. S. 528; *Caldwell v. Texas*, 137 U. S. 692; *Kauffman v. Wooters*, 138 U. S. 285; *Leeper v. Texas*, 139 U. S. 462; *In re Manning*, 139 U. S. 504; *Natal v. Louisiana*, 139 U. S. 621; *Lent v. Tillsen*, 140 U. S. 316; *Kaukauna Co. v. Green Bay*, 142 U. S. 254; *C., A. & C. R. Co. v. Gibbes*, 142 U. S. 386; *Nishimura-Ekin v. United States*, 142 U. S. 651; *Horn Co. v. New York*, 143 U. S. 305; *New York v. Squires*, 145 U. S. 175; *Morley v. Railway Co.*, 146 U. S. 162; *Hallinger v. Davis*, 146 U. S. 314; *Yesler v. Commissioners*, 146 U. S. 646; *Jennings v. Ridge Co.*, 147 U. S. 147; *Glozza v. Tiernan*, 148 U. S. 657; *Paulsen v. Portland*, 149 U. S. 30; *Railway Co. v. Emmons*, 149 U. S. 364; *Railway Co. v. Wright*, 151 U. S. 470; *Lawton v. Steel*, 152 U. S. 133; *Duncan v. Missouri*, 152 U. S. 391; *Scott v. McNeal*, 154 U. S. 34; *Railway Co. v. Backus*, 154 U. S. 421; *Gray v. Connecticut*, 159 U. S. 74; *Central Land Co. v. Laidley*, 159 U. S. 103; *Moore v. Missouri*, 159 U. S. 673; *Railway Co. v. Iowa*, 160 U. S. 389; *Eldridge*

v. Trezevant, 160 U. S. 452; *Lowe v. Kansas*, 163 U. S. 81; *Plessy v. Ferguson*, 163 U. S. 537; *Telegraph Co. v. Taggart*, 163 U. S. 1; *Fallbrook Irrigation District v. Bradley*, 164 U. S. 112; *Railway Co. v. Nebraska*, 164 U. S. 403; *Covington v. Lexington Turnpike Road Co. v. Sandford*, 164 U. S. 578; *Railway Co. v. Mathews*, 165 U. S. 1; *Railway Co. v. Ellis*, 165 U. S. 150; *Jones v. Brim*, 165 U. S. 180; *Express Co. v. Ohio*, 165 U. S. 194; *Telegraph Co. v. Indiana*, 165 U. S. 304; *Railroad Co. v. Chicago*, 166 U. S. 226; *Gladson v. Minnesota*, 166 U. S. 427; *Davis v. Massachusetts*, 167 U. S. 43; *Turner v. New York*, 168 U. S. 90; *Hodgson v. Vermont*, 168 U. S. 262; *Wilson v. Lambert*, 168 U. S. 611; *Holden v. Hardy*, 169 U. S. 366; *Savings Society v. Multnomah County*, 169 U. S. 421; *Smyth v. Ames*, 169 U. S. 466; *United States v. Wong Kim Ark*, 169 U. S. 649; *Wilson v. North Carolina*, 169 U. S. 586; *Williams v. Mississippi*, 170 U. S. 213; *Galveston, etc. Ry. Co. v. Texas*, 170 U. S. 226; *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283; *Williams v. Eggleston*, 170 U. S. 304; *Tinsley v. Anderson*, 171 U. S. 101; *Meyer v. Richmond*, 172 U. S. 82; *Blake v. McClung*, 172 U. S. 239; *Orient Ins. Co. v. Daggs*, 172 U. S. 557; *Central Loan & Trust Co. v. Campbell Commission Co.*, 173 U. S. 84; *Railroad Co. v. Matthews*, 174 U. S. 96; *Brown v. New Jersey*, 175 U. S. 172; *Tullis v. Railroad Co.*, 175 U. S. 348; *Cumming v. Richmond County Board of Education*, 175 U. S. 528; *Blake v. McClung*, 176 U. S. 59; *Weyerhauser v. Minnesota*, 176 U. S. 550; *Maxwell v. Dowe*, 176 U. S. 581; *Ohio Oil Co. v. Indiana*, 177 U. S. 190; *Railroad Co. v. Schmidt*, 177 U. S. 230; *Saranac Land & Timber Co. v. New York*, 177 U. S. 318; *Carter v. Texas*, 177 U. S. 442; *L'Hote v. New Orleans*, 177 U. S. 587; *Sully v. American Nat. Bank*, 178 U. S. 289; *Wheeler v. Railroad Co.*, 178 U. S. 321; *Taylor and Marshall v. Beckham*, 178 U. S. 548; *American Sugar Refining Co. v. Louisiana*, 179 U. S. 89; *New York v. Barker*, 179 U. S. 279; *Mason v. Missouri*, 179 U. S. 328; *Life Asso. v. Mettler*, 181 U. S. 308; *Ins. Co. v. Dobney*, 189 U. S. 301; *Rogers v. Alabama*, 192 U. S. 226.

SECTION 2. Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

SECTION 3. No person shall be a senator or representative in

congress, or elector of president and vice-president, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or support to the enemies thereof. But congress may by a vote of two-thirds of each house, remove such disability.

SECTION 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

SECTION 5. The congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Crandall v. Nevada, 6 Wall. 35; *Paul v. Virginia*, 8 Wall. 168; *Ward v. Maryland*, 12 Wall. 418; *Slaughter-house Cases*, 16 Wall. 36; *Bradwell v. State*, 16 Wall. 130; *Bartemeyer v. Iowa*, 18 Wall. 129; *Minor v. Happersett*, 21 Wall. 162; *Walker v. Sauvinet*, 92 U. S. 90; *Kennard v. Louisiana*, 92 U. S. 480; *United States v. Cruikshank*, 92 U. S. 542; *Munn v. Illinois*, 94 U. S. 113.

ARTICLE XV.

SECTION 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude.

SECTION 2. The congress shall have power to enforce this article by appropriate legislation.

United States v. Reese, 92 U. S. 214; *United States v. Cruikshank*, 92 U. S. 542; *Ex parte Yarborough*, 110 U. S. 651.

The first ten amendments to the constitution of the United States were proposed by the first congress in 1789, and ratified by the requisite number of states in 1790. The eleventh amendment was proposed in 1794, and was declared, in 1798, to have been ratified by the requisite number of states. The twelfth amendment was proposed in 1803, and declared ratified in 1804. The thirteenth amendment was proposed and declared to be ratified in 1865. The fourteenth amendment was proposed in 1866, and declared ratified in 1868; and the fifteenth amendment was proposed in 1869, and declared ratified in 1870.

APPENDIX II.

ORIGINAL JUDICIARY ACT, SEPTEMBER 24, 1789. JUDICIARY ACT, MARCH 3, 1875.

AN ACT to establish the judicial courts of the United States.

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the supreme court of the United States shall consist of a chief justice and five associate justices, any four of whom shall be a quorum, and shall hold annually at the seat of government two sessions, the one commencing the first Monday of February, and the other the first Monday of August. That the associate justices shall have precedence according to the date of their commissions, or when the commissions of two or more of them bear date on the same day, according to their respective ages.

SEC. 2. *And be it further enacted,* That the United States shall be, and they hereby are divided into thirteen districts, to be limited and called as follows, to wit: one to consist of that part of the state of Massachusetts which lies easterly of the state of New Hampshire, and to be called Maine district; one to consist of the state of New Hampshire, and to be called New Hampshire district; one to consist of the remaining part of the state of Massachusetts, and to be called Massachusetts district; one to consist of the state of Connecticut, and to be called Connecticut district; one to consist of the state of New York, and to be called New York district; one to consist of the state of New Jersey, and to be called New Jersey district; one to consist of the state of Pennsylvania, and to be called Pennsylvania district; one to consist of the state of Delaware, and to be called Maryland district; one to consist of the state of Delaware district; one to consist of the state of Maryland, and

Virginia, except that part called the district of Kentucky, and to be called Virginia district; one to consist of the remaining part of the state of Virginia, and to be called Kentucky district; one to consist of the state of South Carolina, and to be called South Carolina district; one to consist of the state of Georgia, and to be called Georgia district.

SEC. 3. *And be it further enacted*, That there be a court called a district court, in each of the afore mentioned districts, to consist of one judge, who shall reside in the district for which he is appointed, and shall be called a district judge, and shall hold annually four sessions, the first of which to commence as follows, to wit: in the districts of New York and of New Jersey on the first, in the district of Pennsylvania on the second, in the district of Connecticut on the third, and in the district of Delaware on the fourth, Tuesdays of November next; in the districts of Massachusetts, of Maine, and of Maryland, on the first, in the district of Georgia on the second, and in the districts of New Hampshire, of Virginia, and of Kentucky, on the third Tuesdays of December next; and the other three sessions progressively in the respective districts on the like Tuesdays of every third calendar month afterwards, and in the district of South Carolina, on the third Monday in March and September, the first Monday in July, and the second Monday in December of each and every year, commencing in December next; and that the district judge shall have power to hold special courts at his discretion. That the stated district court shall be held at the places following, to wit: in the district of Maine, at Portland and Pownalsborough alternately, beginning at the first; in the district of New Hampshire, at Exeter and Portsmouth alternately, beginning at the first; in the district of Massachusetts, at Boston and Salem alternately, beginning at the first; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the first; in the district of New York, at New York; in the district of New Jersey, alternately at New Brunswick and Burlington, beginning at the first; in the district of Pennsylvania, at Philadelphia and York Town alternately, beginning at the first; in the district of Delaware, alternately at Newcastle and Dover, beginning at the first; in the district of Maryland, alternately at Baltimore and Easton, beginning at the first; in the district of Virginia, alternately at Richmond and Williamsburgh, beginning at the

first; in the district of Kentucky, at Harrodsburgh; in the district of South Carolina, at Charleston; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first; and that the special courts shall be held at the same place in each district as the stated courts, or in districts that have two, at either of them, in the discretion of the judge, or at such other place in the district, as the nature of the business and his discretion shall direct. And that in the districts that have but one place for holding the district court, the records thereof shall be kept at that place; and in districts that have two, at that place in each district which the judge shall appoint.

SEC. 4. *And be it further enacted*, That the before mentioned districts, except those of Maine and Kentucky, shall be divided into three circuits, and be called the eastern, the middle, and the southern circuit. That the eastern circuit shall consist of the districts of New Hampshire, Massachusetts, Connecticut and New York; that the middle circuit shall consist of the districts of New Jersey, Pennsylvania, Delaware, Maryland and Virginia; and that the southern circuit shall consist of the districts of South Carolina and Georgia, and that there shall be held annually in each district of said circuits, two courts, which shall be called circuit courts, and shall consist of any two justices of the supreme court, and the district judge of such districts, any two of whom shall constitute a quorum: *Provided*, That no district judge shall give a vote in any case of appeal or error from his own decision; but may assign the reasons of such his decision.

SEC. 5. *And be it further enacted*, That the first session of the said circuit court in the several districts shall commence at the times following, to wit: in New Jersey on the second, in New York on the fourth, in Pennsylvania on the eleventh, in Connecticut on the twenty-second, and in Delaware on the twenty-seventh, days of April next; in Massachusetts on the third, in Maryland on the seventh, in South Carolina on the twelfth, in New Hampshire on the twentieth, in Virginia on the twenty-second, and in Georgia on the twenty-eighth, days of May next, and the subsequent sessions in the respective districts on the like days of every sixth calendar month afterwards, except in South Carolina, where the session of the said court shall commence on the first, and in Georgia where it shall commence on the seventeenth day of October, and except when any of those

days shall happen on a Sunday, and then the session shall commence on the next day following. And the sessions of the said circuit court shall be held in the district of New Hampshire, at Portsmouth and Exeter alternately, beginning at the first; in the district of Massachusetts, at Boston; in the district of Connecticut, alternately at Hartford and New Haven, beginning at the last; in the district of New York, alternately at New York and Albany, beginning at the first; in the district of New Jersey, at Trenton; in the district of Pennsylvania, alternately at Philadelphia and Yorktown, beginning at the first; in the district of Delaware, alternately at New Castle and Dover, beginning at the first; in the district of Maryland, alternately at Annapolis and Easton, beginning at the first; in the district of Virginia, alternately at Charlottesville and Williamsburgh, beginning at the first; in the district of South Carolina, alternately at Columbia and Charleston, beginning at the first; and in the district of Georgia, alternately at Savannah and Augusta, beginning at the first. And the circuit courts shall have power to hold special sessions for the trial of criminal causes at any other time at their discretion, or at the discretion of the supreme court.

SEC. 6. *And be it further enacted*, That the supreme court may, by any one or more of its justices being present, be adjourned from day to day until a quorum be convened; and that a circuit court may also be adjourned from day to day by any one of its judges, or if none are present, by the marshal of the district until a quorum be convened; and that a district court, in case of the inability of the judge to attend at the commencement of a session, may by virtue of a written order from the said judge, directed to the marshal of the district, be adjourned by the said marshal to such day, antecedent to the next stated session of the said court, as in the said order shall be appointed; and in the case of the death of the said judge, and his vacancy not being supplied, all process, pleadings and proceedings of what nature soever, pending before the said court, shall be continued of course until the next stated session after the appointment and acceptance of the office by his successor.

SEC. 7. *And be it [further] enacted* That the supreme court, and the district courts shall have power to appoint clerks for their respective courts, and that the clerk for each district court shall be clerk also of the circuit court in such district, and

each of the said clerks shall, before he enters upon the execution of his office, take the following oath or affirmation, to wit: "I, A. B., being appointed clerk of —, do solemnly swear, or affirm, that I will truly and faithfully enter and record all the orders, decrees, judgments and proceedings of the said court, and that I will faithfully and impartially discharge and perform all the duties of my said office, according to the best of my abilities and understanding. So help me God." Which words, so help me God, shall be omitted in all cases where an affirmation is admitted instead of an oath. And the said clerks shall also severally give bond, with sufficient sureties, (to be approved of by the supreme and district courts respectively) to the United States, in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk.

SEC. 8. *And be it further enacted*, That the justices of the supreme court, and the district judges, before they proceed to execute the duties of their respective offices, shall take the following oath or affirmation, to wit: "I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as —, according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God."

SEC. 9. *And be it further enacted*, That the district courts shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States, committed within their respective districts, or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes, a fine not exceeding one hundred dollars, or a term of imprisonment not exceeding six months, is to be inflicted; and shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common

law is competent to give it; and shall also have exclusive original cognizance of all seizures on land, or other waters than as aforesaid, made, and of all suits for penalties and forfeitures incurred, under the laws of the United States. And shall also have cognizance, concurrent with the courts of the several states, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States. And shall also have cognizance, concurrent as last mentioned, of all suits at common law where the United States sue, and the matter in dispute amounts, exclusive of costs, to the sum or value of one hundred dollars. And shall also have jurisdiction exclusively of the courts of the several states, of all suits against consuls or vice-consuls, except for offenses above the description aforesaid. And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.

SEC. 10. *And be it further enacted*, That the district court in Kentucky district shall, besides the jurisdiction aforesaid, have jurisdiction of all other causes, except of appeals and writs of error, hereinafter made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court, and writs of error and appeals shall lie from decisions therein to the supreme court in the same causes, as from a circuit court to the supreme court, and under the same regulations. And the district court in Maine district shall, besides the jurisdiction herein before granted, have jurisdiction of all causes, except of appeals and writs of error herein after made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court: And writs of error shall lie from decisions therein to the circuit court in the district of Massachusetts in the same manner as from other district courts to their respective circuit courts.

SEC. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the United States are plaintiffs, or petitioners; or an alien is a party, or the suit is between a citizen of the state where the suit is brought, and a citizen of another state. And shall have ex-

clusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another, in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, nor shall any district or circuit court have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in cases of foreign bills of exchange. And the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions herein after provided.

SEC. 12. *And be it further enacted*, That if a suit be commenced in any state court against an alien, or by a citizen of the state in which the suit is brought against a citizen of another state, and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs, to be made to appear to the satisfaction of the court; and the defendant shall, at the time of entering his appearance in such state court, file a petition for the removal of the cause for trial into the next circuit court, to be held in the district where the suit is pending, or if in the district of Maine to the district court next to be holden therein, or if in Kentucky district to the district court next to be holden therein, and offer good and sufficient surety for his entering in such court, on the first day of its session, copies of said process against him, and also for his there appearing and entering special bail in the cause, if special bail was originally requisite therein, it shall then be the duty of the state court to accept the surety, and proceed no further in the cause, and any bail that may have been originally taken shall be discharged, and the said copies being entered as aforesaid, in such court of the United States, the cause shall there proceed in the same manner as if it had been brought there by original process. And any attachment of

the goods or estate of the defendant by the original process, shall hold the goods or estate so attached, to answer the final judgment in the same manner as by the laws of such state they would have been holden to answer final judgment, had it been rendered by the court in which the suit was commenced. And if in any action commenced in a state court, the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceeds the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear to the satisfaction of the court, either party, before the trial, shall state to the court and make affidavit if they require it, that he claims and shall rely upon a right or title to the land, under a grant from a state other than that in which the suit is pending, and produce the original grant or an exemplification of it, except where the loss of public records shall put it out of his power, and shall move that the adverse party inform the court, whether he claims a right or title to the land under a grant from the state in which the suit is pending; the said adverse [party] shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial, and if he informs that he does claim under such grant, the party claiming under the grant first mentioned may then, on motion, remove the cause for trial to the next circuit court to be holden in such district, or if in the district of Maine, to the court next to be holden therein; or if in Kentucky district, to the district court next to be holden therein; but if he is the defendant, shall do it under the same regulations as in the before-mentioned case of the removal of a cause into such court by an alien; and neither party removing the cause, shall be allowed to plead or give evidence of any other title than that by him stated as aforesaid, as the ground of his claim; and the trial of issues in fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.

SEC. 13. *And be it further enacted*, That the supreme court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state and its citizens; and except also between a state and citizens of other states, or aliens, in which latter case it shall have original but not exclusive jurisdiction. And shall have exclusively

all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have or exercise consistently with the law of nations; and original, but not exclusive jurisdiction of all suits brought by ambassadors, or other public ministers, or in which a consul, or vice consul, shall be a party. And the trial of issues in fact in the supreme court, in all actions at law against citizens of the United States, shall be by jury. The supreme court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases hereinafter specially provided for; and shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

SEC. 14. *And be it further enacted*, That all the before-mentioned courts of the United States, shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as the judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment.—*Provided*, That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify.

SEC. 15. *And be it further enacted*, That all the said courts of the United States, shall have power in the trial of actions at law, on motion and due notice thereof being given, to require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might be compelled to produce the same by the ordinary rules of proceeding in chancery; and if a plaintiff shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively, on motion, to give the like judgment for

the defendant as in cases of nonsuit; and if a defendant shall fail to comply with such order, to produce books or writings, it shall be lawful for the courts respectively on motion as aforesaid, to give judgment against him or her by default.

SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

SEC. 17. *And be it further enacted*, That all the said courts of the United States shall have power to grant new trials, in cases where there has been a trial by jury for reasons for which new trials have usually been granted in the courts of law; and shall have power to impose and administer all necessary oaths or affirmations, and to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same; and to make and establish all necessary rules for the orderly conducting business in the said courts, provided such rules are not repugnant to the laws of the United States.

SEC. 18. *And be it further enacted*, That when in a circuit court, judgment upon a verdict in a civil action shall be entered, execution may on motion of either party, at the discretion of the court, and on such conditions for the security of the adverse party as they may judge proper, be stayed forty-two days from the time of entering judgment, to give time to file in the clerk's office of said court, a petition for a new trial. And if such petition be there filed within said term of forty-two days, with a certificate thereon from either of the judges of such court, that he allows the same to be filed, which certificate he may make or refuse at his discretion, execution shall of course be further stayed to the next session of said court. And if a new trial be granted, the former judgment shall be thereby rendered void.

SEC. 19. *And be it further enacted*, That it shall be the duty of circuit courts, in causes in equity and of admiralty and maritime jurisdiction, to cause the facts on which they found their sentence or decree, fully to appear upon the record either from the pleadings and decree itself, or a state of the case agreed by the parties, or their counsel, or if they disagree by a stating of the case by the court.

SEC. 20. *And be it further enacted*, That where in a circuit

court, a plaintiff in an action, originally brought there, or a petitioner in equity, other than the United States, recovers less than the sum or value of five hundred dollars, or a libellant, upon his own appeal, less than the sum or value of three hundred dollars, he shall not be allowed, but at the discretion of the court, may be adjudged to pay the costs.

SEC. 21. *And be it further enacted*, That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court, to be held in such district. *Provided, nevertheless*, That all such appeals from final decrees as aforesaid, from the district court of Maine, shall be made to the circuit court, next to be holden after each appeal in the district of Massachusetts.

SEC. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, and assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court, or a justice of the supreme court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the supreme court. the citation being in such case signed by a judge of such circuit court, or justice of the supreme court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person enti-

tled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good.

SEC. 23. *And be it further enacted*, That a writ of error as aforesaid shall be a *supersedeas* and stay execution in cases only where the writ of error is served, by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, after rendering the judgment or passing the decree complained of. Until the expiration of which term of ten days, executions shall not issue in any case where a writ of error may be a *supersedeas*; and whereupon such writ of error the supreme or a circuit court shall affirm a judgment or decree, they shall adjudge or decree to the respondent in error just damages for his delay, and single or double costs at their discretion.

SEC. 24. *And be it further enacted*, That when a judgment or decree shall be reversed in a circuit court, such court shall proceed to render such judgment or pass such decree as the district court should have rendered or passed; and the supreme court shall do the same on reversals therein, except where the reversal is in favor of the plaintiff, or petitioner in the original suit, and the damages to be assessed, or matter to be decreed, are uncertain, in which case they shall remand the cause for a final decision. And the supreme court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereupon.

SEC. 25. *And be it further enacted*, That a final judgment or decree in any suit, in the highest court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity, or where is drawn in question

the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

SEC. 26. *And be it further enacted*, That in all causes brought before either of the courts of the United States to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach or non-performance shall appear, by the default or confession of the defendant, or upon demurrer, the court before whom the action is, shall render judgment therein for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury.

SEC. 27. *And be it further enacted*, That a marshal shall be appointed in and for each district for the term of four years, but shall be removable from his office at pleasure, whose duty it shall be to attend the district and circuit courts when sitting therein, and also the supreme court in the district in which that court shall sit. And to execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States, and he shall have power to com-

mand all necessary assistance in the execution of his duty, and to appoint as there shall be occasion, one or more deputies, who shall be removable from office by the judge of the district court, or the circuit court sitting within the district, at the pleasure of either; and before he enters on the duties of his office, he shall become bound for the faithful performance of the same, by himself and by his deputies before the judge of the district court to the United States, jointly and severally, with two good and sufficient sureties, inhabitants and freeholders of such district, to be approved by the district judge, in the sum of twenty thousand dollars, and shall take before said judge, as shall also his deputies, before they enter on the duties of their appointment, the following oath of office: "I, A. B., do solemnly swear or affirm, that I will faithfully execute all lawful precepts directed to the marshal of the district of — under the authority of the United States, and true returns make, and in all things well and truly, and without malice or partiality, perform the duties of the office of marshal (or marshal's deputy, as the case may be) of the district of —, during my continuance in said office, and take only my lawful fees. So help me God."

SEC. 28. *And be it further enacted*, That in all causes wherein the marshal or his deputy shall be a party, the writs and precepts therein shall be directed to such disinterested person as the court, or any justice or judge thereof may appoint, and the person so appointed, is hereby authorized to execute and return the same. And in case of the death of any marshal, his deputy or deputies shall continue in office, unless otherwise specially removed; and shall execute the same in the name of the deceased, until another marshal shall be appointed and sworn: And the defaults or misfeasances in office of such deputy or deputies in the meantime, as well as before, shall be adjudged a breach of the condition of the bond given, as before directed, by the marshal who appointed them; and the executor or administrator of the deceased marshal shall have like remedy for the defaults and misfeasances in office of such deputy or deputies during such interval, as they would be entitled to if the marshal had continued in life and in the exercise of his said office, until his successor was appointed, and sworn or affirmed: And every marshal or his deputy when removed from office, or when the term for which the marshal is ap-

pointed shall expire, shall have power notwithstanding to execute all such precepts as may be in their hands respectively at the time of such removal or expiration of office; and the marshal shall be held answerable for the delivery to his successor of all prisoners which may be in his custody at the time of his removal, or when the term for which he is appointed shall expire, and for that purpose may retain such prisoners in his custody until his successor shall be appointed and qualified as the law directs.

SEC. 29. *And be it further enacted*, That in cases punishable with death, the trial shall be had in the county where the offense was committed, or where that cannot be done without great inconvenience, twelve petit jurors at least shall be summoned from thence. And jurors in all cases to serve in the courts of the United States shall be designated by lot or otherwise in each state respectively according to the mode of forming juries therein now practiced, so far as the laws of the same shall render such designation practicable by the courts or marshals of the United States; and the jurors shall have the same qualifications as are requisite for jurors by the laws of the state of which they are citizens, to serve in the highest courts of law of such state, and shall be returned as there shall be occasion for them from such parts of the district from time to time as the court shall direct, so as shall be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly to burthen the citizens of any part of the district with such services. And writs of *venire facias* when directed by the court shall issue from the clerk's office, and shall be served and returned by the marshal in his proper person, or by his deputy, or in case the marshal or his deputy is not an indifferent person, or is interested in the event of the cause, by such fit person as the court shall specially appoint for that purpose, to whom they shall administer an oath or affirmation that he will truly and impartially serve and return such writ. And when from challenges or otherwise there shall not be a jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court where such defect of jurors shall happen, return jurymen *de talibus circumstantibus* sufficient to complete the panel; and when the marshal or his deputy are disqualified as aforesaid, jurors may be returned by such disinterested person as the court shall appoint.

SEC. 30. *And be it further enacted*, That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court of the United States, who shall live at a greater distance from the place of trial than one hundred miles, or is bound on a voyage to sea, or is about to go out of the United States, or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may be taken *de bene esse* before any justice or judge of any of the courts of the United States, or before any chancellor, justice or judge of a supreme or superior court, mayor or chief magistrate of a city, or judge of a county court or court of common pleas of any of the United States, not being of counsel or attorney to either of the parties, or interested in the event of the cause, provided that a notification from the magistrate before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit, be first made out and served on the adverse party or his attorney as either may be nearest, if either is within one hundred miles of the place of such caption, allowing time for their attendance after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel. And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libeled at the time of the capture or seizure of the same, if known to the libelant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence. And the depositions so taken shall be retained by such magistrate until he deliver the same with his own hand

into the court for which they are taken, or shall, together with a certificate of the reasons aforesaid of their being taken, and of the notice if any given to the adverse party, be by him the said magistrate sealed up and directed to such court, and remain under his seal until opened in court. And any such person may be compelled to appear and depose as aforesaid in the same manner as to appear and testify in court. And in the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal, that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that by reason of age, sickness, bodily infirmity or imprisonment, they are unable to travel and appear at court, but not otherwise. And unless the same shall be made to appear on the trial of any cause, with respect to witnesses whose depositions may have been taken therein, such depositions shall not be admitted or used in the cause. *Provided*, That nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage, when it may be necessary to prevent a failure or delay of justice, which power they shall severally possess, nor to extend to depositions taken in *perpetuam rei memoriam*, which if they relate to matters that may be cognizable in any court of the United States, a circuit court on application thereto made as a court of equity, may, according to the usages in chancery direct to be taken.

SEC. 31. *And be it [further] enacted*, That where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment; and the defendant or defendants are hereby obliged to answer thereto accordingly;

and the court before whom such cause may be depending, is hereby empowered and directed to hear and determine the same, and to render judgment for or against the executor or administrator, as the case may require. And if such executor or administrator having been duly served with a *scire facias* from the office of the clerk of the court where such suit is depending, twenty days beforehand, shall neglect or refuse to become a party to the suit, the court may render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party to the suit. And the executor or administrator who shall become a party as aforesaid, shall, upon motion to the court where the suit is depending, be entitled to a continuance of the same until the next term of the said court. And if there be two or more plaintiffs or defendants, and one or more of them shall die, if the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated; but such death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs against the surviving defendant or defendants.

SEC. 32. *And be it further enacted*, That no summons, writ, declaration, return, process, judgment, or other proceedings in civil causes in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts respectively shall proceed and give judgment according as the right of the cause and matter in law shall appear unto them, without regarding any imperfections, defects, or want of form in such writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. And the said courts respectively shall and may, by virtue of this act, from time to time, amend all and every such imperfections, defects and wants of form, other than those only which the party demurring shall express as aforesaid, and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as the said courts respectively shall in their discretion, and by their rules prescribe.

SEC. 33. *And be it further enacted*, That for any crime or

offense against the United States, the offender may, by any justice or judge of the United States, or by any justice of the peace, or other magistrate of any of the United States where he may be found agreeably to the usual mode of process against offenders in such state, and at the expense of the United States, be arrested, and imprisoned or bailed, as the case may be, for trial before such court of the United States as by this act has cognizance of the offense. And copies of the process shall be returned as speedily as may be into the clerk's office of such court, together with the recognizances of the witnesses for their appearance to testify in the case; which recognizances the magistrate before whom the examination shall be, may require on pain of imprisonment. And if such commitment of the offender, or the witnesses shall be in a district other than that in which the offense is to be tried, it shall be the duty of the judge of that district where the delinquent is imprisoned, seasonably to issue, and of the marshal of the same district to execute a warrant for the removal of the offender, and the witnesses, or either of them, as the case may be, to the district in which the trial is to be had. And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and the usages of law. And if a person committed by a justice of the supreme or a judge of a district court for an offense not punishable with death, shall afterwards procure bail, and there be no judge of the United States in the district to take the same, it may be taken by any judge of the supreme or superior court of law of such state.

SEC. 34. *And be it further enacted*, That the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply.

SEC. 35. *And be it further enacted*, That in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of such counsel or attorneys at law as by the rules of the said courts respectively shall be permitted to manage and conduct causes therein. And

there shall be appointed in each district a meet person learned in the law to act as attorney for the United States in such district, who shall be sworn or affirmed to the faithful execution of his office, whose duty it shall be to prosecute in such district all delinquents for crimes and offenses, cognizable under the authority of the United States, and all civil actions in which the United States shall be concerned, except before the supreme court in the district in which that court shall be holden. And he shall receive as a compensation for his services such fees as shall be taxed therefor in the respective courts before which the suits or prosecutions shall be. And there shall also be appointed a meet person, learned in the law, to act as attorney-general for the United States, who shall be sworn or affirmed to a faithful execution of his office; whose duty it shall be to prosecute and conduct all suits in the supreme court in which the United States shall be concerned, and to give his advice and opinion upon questions of law when required by the president of the United States, or when requested by the heads of any of the departments, touching any matters that may concern their departments, and shall receive such compensation for his services as shall by law be provided.

Approved September 24, 1789.¹

¹ 1 U. S. Stat. at L., ch. 20, pp. 73-79.

JUDICIARY ACT, MARCH 3, 1875.

AN ACT to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects; and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable therein. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court. And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding, except as hereinafter provided; nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange. And the circuit courts

shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law.

SEC. 2. That any suit of a civil nature, at law or in equity, now pending or hereafter brought in any state court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which the United States shall be plaintiff or petitioner, or in which there shall be a controversy between citizens of different states, or a controversy between citizens of the same state claiming land under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, either party may remove said suit into the circuit court of the United States for the proper district. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the plaintiffs or defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district.

SEC. 3. That whenever either party or any one or more of the plaintiffs or defendants entitled to remove any suit mentioned in the next preceding section, shall desire to remove such suit from a state court to the circuit court of the United States, he or they may make and file a petition in such suit in such state court before or at the term at which said cause could be first tried and before the trial thereof for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court, if said court shall hold that such suit was wrongfully or improperly removed thereto, and also for there appearing and entering special bail in such suit, if special bail was originally requisite therein, it shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit, and any bail that may have been originally taken shall be discharged; and the said copy being entered as aforesaid in said circuit court of the United States, the cause shall then proceed in the same

manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of five hundred dollars, exclusive of costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court and make affidavit, if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state, the party or parties so required shall give such information, or otherwise not be allowed to plead such grant, or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one of either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim; and the trial of issues of fact in the circuit courts shall, in all suits except those of equity and of admiralty and maritime jurisdiction, be by jury.

SEC. 4. That when any suit shall be removed from a state court to a circuit court of the United States, any attachment or sequestration of the goods or estate of the defendant had in such suit in the state court shall hold the goods or estate so attached or sequestered to answer the final judgment or decree in the same manner as by law they would have been held to answer final judgment or decree had it been rendered by the court in which such suit was commenced; and all bonds, undertakings, or security given by either party in such suit prior to its removal shall remain valid and effectual, notwithstanding said removal; and all injunctions, orders, and other proceedings had in such suit prior to its removal shall remain in full force and effect until dissolved or modified by the court to which such suit shall be removed.

SEC. 5 That if, in any suit commenced in a circuit court or

removed from a state court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be.

SEC. 6. That the circuit court of the United States shall, in all suits removed under the provisions of this act, proceed therein as if the suit had been originally commenced in said circuit court, and the same proceedings had been taken in such suit in said circuit court as shall have been had therein in said state court prior to its removal.

SEC. 7. That in all cases removable under this act, if the term of the circuit court to which the same is removable, then next to be holden, shall commence within twenty days after filing the petition and bond in the state court for its removal, then he or they who apply to remove the same shall have twenty days from such application to file said copy of record in said circuit court, and enter appearance therein; and if done within said twenty days, such filing and appearance shall be taken to satisfy the said bond in that behalf; that if the clerk of the state court in which any such cause shall be pending, shall refuse to any one or more of the parties or persons applying to remove the same, a copy of the record therein, after tender of legal fees for such copy, said clerk so offending shall be deemed guilty of a misdemeanor, and, on conviction thereof in the circuit court of the United States to which said action or proceeding was removed, shall be punished by imprisonment not more than one year, or by fine not exceeding one thousand dollars, or both in the discretion of the court.

And the circuit court to which any cause shall be removable under this act shall have power to issue a writ of *cer-*

tiorari to said state court commanding said state court to make return of the record in any such cause removed as aforesaid, or in which any one or more of the plaintiffs or defendants have complied with the provisions of this act for the removal of the same, and enforce said writ according to law; and if it shall be impossible for the parties or persons removing any cause under this act, or complying with the provisions for the removal thereof, to obtain such copy, for the reason that the clerk of said state court refuses to furnish a copy, on payment of legal fees, or for any other reason, the circuit court shall make an order requiring the prosecutor in any such action or proceeding to enforce forfeiture or recover penalty as aforesaid, to file a copy of the paper or proceeding by which the same was commenced, within such time as the court may determine; and in default thereof the court shall dismiss the said action or proceeding; but if said order shall be complied with, then said circuit court shall require the other party to plead, and said action or proceeding shall proceed to final judgment; and the said circuit court may make an order requiring the parties thereto to plead *de novo*; and the bond given, conditioned as aforesaid, shall be discharged so far as it requires copy of the record to be filed as aforesaid.

SEC. 8. That when in any suit, commenced in any circuit court of the United States, to enforce any legal or equitable lien upon, or claim to, or to remove any incumbrance or lien or cloud upon the title to real or personal property within the district where such suit is brought, one or more of the defendants therein shall not be an inhabitant of, or found within, the said district, or shall not voluntarily appear thereto, it shall be lawful for the court to make an order directing such absent defendant or defendants to appear, plead, answer, or demur, by a day certain to be designated, which order shall be served on such absent defendant or defendants, if practicable, wherever found, and also upon the person or persons in possession or charge of said property, if any there be; or where such personal service upon such absent defendant or defendants is not practicable, such order shall be published in such manner as the court may direct, not less than once a week for six consecutive weeks; and in case such absent defendant shall not appear, plead, answer, or demur within the time so limited, or within some further time, to be allowed by the court, in its

discretion, and upon proof of the service or publication of said order, and of the performance of the directions contained in the same, it shall be lawful for the court to entertain jurisdiction, and proceed to the hearing and adjudication of such suit in the same manner as if such absent defendant had been served with process within the said district; but said adjudication shall, as regards said absent defendant or defendants without appearance, affect only the property which shall have been the subject of the suit and under the jurisdiction of the court therein, within such district. And when a part of the said real or personal property against which such proceeding shall be taken shall be within another district but within the same state, said suit may be brought in either district in said state; *provided, however*, that any defendant or defendants not actually personally notified as above provided may, at any time within one year after final judgment in any suit mentioned in this section, enter his appearance in said suit in said circuit court, and thereupon the said court shall make an order setting aside the judgment therein, and permitting said defendant or defendants to plead therein on payment by him or them of such costs as the court shall deem just; and thereupon said suit shall be proceeded with to final judgment according to law.

SEC. 9. That whenever either party to a final judgment or decree which has been or shall be rendered in any circuit court has died or shall die before the time allowed for taking an appeal or bringing a writ of error has expired, it shall not be necessary to revive the suit by any formal proceedings aforesaid. The representative of such deceased party may file in the office of the clerk of such circuit court a duly certified copy of his appointment and thereupon may enter an appeal or bring writ of error as the party he represents might have done. If the party in whose favor such judgment or decree is rendered has died before appeal taken or writ of error brought, notice to his representatives shall be given from the supreme court, as provided in case of the death of a party after appeal taken or writ of error brought.

SEC. 10. That all acts and parts of acts in conflict with the provisions of this act are hereby repealed.

Approved March 3, 1875.¹

¹ 18 U. S. Stat. at L., ch. 137, pp. 470-473.

**JUDICIARY ACT MARCH 3, 1887. AS CORRECTED BY
ACT AUGUST 13, 1888.**

AN ACT to correct the enrollment of an act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from the state courts, and for other purposes, approved March third, eighteen hundred and seventy-five."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act approved March third, eighteen hundred and eighty-seven, entitled "An act to amend sections one, two, three, and ten of an act to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes, approved March third, eighteen hundred and seventy-five," be, and the same is hereby amended so as to read as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first section of an act entitled 'An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes,' approved March third, eighteen hundred and seventy-five, be, and the same is hereby, amended so as to read as follows:

"That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, or a controversy

between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens, or subjects, in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value aforesaid, and shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except as otherwise provided by law, and concurrent jurisdiction with the district courts of the crimes and offenses cognizable by them. But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is founded only on the fact that the action is between citizens of different states, suits shall be brought only in the district of the residence of either the plaintiff or the defendant, nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made; and the circuit courts shall also have appellate jurisdiction from the district courts under the regulations and restrictions prescribed by law."

That the second section of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 2. ' That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority, of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending, or which may hereafter be brought, in any state court, may be removed by the defendant or defendants therein to the circuit court of the United States for the proper district. Any other suit of a civil nature, at law or in equity, of which the circuit courts of the United States are given jurisdiction by the preceding section, and which are now pending, or which may hereafter be brought, in any state court, may be removed into the circuit court of the United States for the proper district

by the defendant or defendants therein, being non-residents of that state. And when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district. And where a suit is now pending, or may be hereafter brought, in any state court, in which there is a controversy between a citizen of the state in which the suit is brought and a citizen of another state, any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or in any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice or local influence, to remove said cause: *Provided*, That if it further appear that said suit can be fully and justly determined as to the other defendants in the state court, without being affected by such prejudice or local influence, and that no party to the suit will be prejudiced by a separation of the parties, said circuit court may direct the suit to be remanded, so far as relates to such other defendants, to the state court, to be proceeded with therein.

“At any time before the trial of any suit which is now pending in any circuit court or may hereafter be entered therein, and which has been removed to said court from a state court on the affidavit of any party plaintiff that he had reason to believe and did believe that, from prejudice or local influence, he was unable to obtain justice in said state court, the circuit court shall, on application of the other party, examine into the truth of said affidavit and the grounds thereof. and, unless it shall appear to the satisfaction of said court that said party will not be able to obtain justice in such state court, it shall cause the same to be remanded thereto.

“Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it

came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

That section three of said act be, and the same is hereby, amended so as to read as follows:

"SEC. 3. That whenever any party entitled to remove any suit mentioned in the next preceding section, except in such cases as are provided for in the last clause of said section, may desire to remove such suit from a state court to the circuit court of the United States, he may make and file a petition in such suit in such state court at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending, and shall make and file therewith a bond, with good and sufficient surety, for his or their entering in such circuit court, on the first day of its then next session, a copy of the record in such suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that suit was wrongfully or improperly removed thereto, and also for their appearing and entering special bail in such suit if special bail was originally requisite therein. It shall then be the duty of the state court to accept said petition and bond, and proceed no further in such suit; and the said copy being entered as aforesaid in the said circuit court of the United States, the cause shall then proceed in the same manner as if it had been originally commenced in the said circuit court; and if in any action commenced in a state court the title of land be concerned, and the parties are citizens of the same state, and the matter in dispute exceed the sum or value of two thousand dollars, exclusive of interest and costs, the sum or value being made to appear, one or more of the plaintiffs or defendants, before the trial, may state to the court, and make affidavit if the court require it, that he or they claim and shall rely upon a right or title to the land under a grant from a state, and produce the original grant, or an exemplification of it, except where the loss of public records shall put it out of his or their power, and shall move that any one or more of the adverse party inform the court whether he or they claim a right or title to the land under a grant from some other state,

the party or parties so required shall give such information, or otherwise not be allowed to plead such grant or give it in evidence upon the trial; and if he or they inform that he or they do claim under such grant, any one or more of the party moving for such information may then, on petition and bond, as hereinbefore mentioned in this act, remove the cause for trial to the circuit court of the United States next to be holden in such district; and any one or either party removing the cause shall not be allowed to plead or give evidence of any other title than that by him or them stated as aforesaid as the ground of his or their claim."

SEC. 2. That whenever in any cause pending in any court of the United States there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof. Any receiver or manager who shall wilfully violate the provisions of this section shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding three thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. That every receiver or manager of any property appointed by any court of the United States may be sued in respect of any act or transaction of his in carrying on the business connected with such property, without the previous leave of the court in which such receiver or manager was appointed; but such suit shall be subject to the general equity jurisdiction of the court in which such receiver or manager was appointed, so far as the same shall be necessary to the ends of justice.

SEC. 4. That all national banking associations established under the laws of the United States shall, for the purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the states in which they are respectively located; and in such cases the circuit and district courts shall not have jurisdiction other than such as they would have in cases between individual citizens of the same state.

The provisions of this section shall not be held to affect the

jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank.

SEC. 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections six hundred and forty-one, or in six hundred and forty-two, or in six hundred and forty-three, or in seven hundred and twenty-two, or in title twenty-four of the Revised Statutes of the United States, or mentioned in section eight of the act of congress of which this act is an amendment, or in the act of congress approved March first, eighteen hundred and seventy-five, entitled "An act to protect all citizens in their civil and legal rights."

SEC. 6. That the last paragraph of section five of the act of congress approved March third, eighteen hundred and seventy-five, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from state courts, and for other purposes," and section six hundred and forty of the Revised Statutes, and all laws and parts of laws in conflict with the provisions of this act, be, and the same are hereby repealed: *Provided*, That this act shall not affect the jurisdiction over or disposition of any suit removed from the court of any state, or suit commenced in any court of the United States, before the passage hereof except as otherwise expressly provided in this act.

SEC. 7. That no person related to any justice or judge of any court of the United States by affinity or consanguinity within the degree of first cousin shall hereafter be appointed by such court or judge to, or employed by such court or judge in, any office or duty in any court of which such justice or judge may be a member.

Approved August 13, 1888.¹

¹25 U. S. Stat. at L., ch. 866, p. 433.

JUDICIARY ACT, MARCH 3, 1891.

AN ACT to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there shall be appointed by the president of the United States, by and with the advice and consent of the senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. Such court shall prescribe the form and style of its seal and the form of writs and other process and procedure as may be conformable to the exercise of its jurisdiction as shall be conferred by law. It shall have the appointment of the marshal of the court with the same duties and powers under the regulations of the court as are now provided for the marshal of the supreme court of the United States, so far as the same may be applicable. The court shall also appoint a clerk, who shall perform and exercise the same duties and powers in regard to all matters within its jurisdiction as are now exercised and performed by the clerk of the supreme court of the United States, so far as the same may be applicable. The salary of the marshal of the court shall be twenty-five hundred dollars a year, and the salary of the clerk of the court shall be three thousand dollars a year, to be paid in equal proportions quarterly. The costs and fees in the supreme court now provided

for by law shall be costs and fees in the circuit courts of appeals; and the same shall be expended, accounted for, and paid for, and paid over to the treasury department of the United States in the same manner as is provided in respect of the costs and fees in the supreme court.

The court shall have the power to establish all rules and regulations for the conduct of the business of the court within its jurisdiction as conferred by law.

SEC. 3. That the chief justice and the associate justices of the supreme court assigned to each circuit, and the circuit judges within each circuit and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the chief justice or an associate justice of the supreme court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the chief justice or associate justice of the supreme court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the chief justice or an associate justice of the supreme court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit in the city of Chicago; in the eighth circuit, in the city of St. Louis; in the ninth circuit, in the city of San Francisco; and in such other places in each of the above circuits as said court may from time to time designate. The first term of said courts shall be held on

the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error, or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court in the following cases:

In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States.

Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided

by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the supreme court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the supreme court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the supreme court to require, by *certiorari* or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

SEC. 7. That where, upon a hearing in equity in a district court, or in an existing circuit court, an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall

take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal.

SEC. 8. That any justice or judge, who, in pursuance of the provisions of this act, shall attend the circuit court of appeals held at any place other than where he resides shall, upon his written certificate, be paid by the marshal of the district in which the court shall be held his reasonable expenses for travel and attendance, not to exceed ten dollars per day, and such payments shall be allowed the marshal in the settlement of his accounts with the United States.

SEC. 9. That the marshals of the several districts in which said circuit court of appeals may be held shall, under the direction of the attorney-general of the United States, and with his approval, provide such rooms in the public buildings of the United States as may be necessary, and pay all incidental expenses of said court, including criers, bailiffs, and messengers: *Provided, however,* That in case proper rooms cannot be provided in such buildings, then the said marshals, with the approval of the attorney-general of the United States, may, from time to time, lease such rooms as may be necessary for such courts. That the marshals, criers, clerks, bailiffs, and messengers shall be allowed the same compensation for their respective service as are allowed for similar services in the existing circuit courts.

SEC. 10. That whenever on appeal or writ of error or otherwise a case coming directly from the district court or existing circuit court shall be reviewed and determined in the supreme court the cause shall be remanded to the proper district or circuit court for further proceedings to be taken in pursuance of such determination. And whenever on appeal or writ of error or otherwise a case coming from a circuit court of appeals shall be reviewed and determined in the supreme court the cause shall be remanded by the supreme court to the proper district or circuit court for further proceedings in pursuance of such determination. Whenever on appeal or writ of error or otherwise a case coming from a district or circuit court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district or circuit court for

further proceedings to be there taken in pursuance of such determination.

SEC. 11. That no appeal or writ of error by which any order, judgment, or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment, or decree sought to be reviewed: *Provided, however,* That in all cases in which a lesser time is now by law limited for appeals or writs of error such limits of time shall apply to appeals or writs of error in such cases taken to or sued out from the circuit courts of appeals. And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals and writs of error provided for in this act in respect of the circuit courts of appeal, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively.

SEC. 12. That the circuit court of appeals shall have the powers specified in section seven hundred and sixteen of the Revised Statutes of the United States.

SEC. 13. Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian territory to the supreme court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States, under this act.

SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section three of an act entitled "An act to facilitate the disposition of cases in the supreme court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

SEC. 15. That the circuit court of appeals in cases in which the judgments of the circuit courts of appeal are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several territories shall, by orders of the supreme court, to be made from time to time, be assigned to particular circuits.

Approved March 3, 1891.¹

¹ 26 U. S. Stat. at L., ch. 517, p. 826.

JOINT RESOLUTION.

To provide for the organization of the circuit courts of appeals.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the first meeting of the several circuit courts of appeals mentioned in the act of congress passed at this present session entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," shall be held on the third Tuesday in June, A. D. eighteen hundred and ninety-one; and if, from any casualty, the first meeting of any of said courts shall fail to be so held on that day, the first meeting of any such court so failing to be held, shall be held on such day subsequent thereto as the chief justice, or any justice of the supreme court of the United States assigned to such circuit shall direct: *And be it further resolved,* That nothing in said act shall be held or construed in anywise to impair the jurisdiction of the supreme court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, anno Domini, eighteen hundred and ninety-one.

Approved March 3, 1891.¹

¹ 26 U. S. Stat. at L., p. 1115.

**ACT AMENDING SECTION 7, JUDICIARY ACT,
MARCH 3, 1891.**

AN ACT to amend the act entitled an act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March third, eighteen hundred and ninety-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the seventh section of the act of congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby amended to read as follows:

That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused, in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving, or refusing to dissolve an injunction, to the circuit court of appeals: *Provided,* That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceeding in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal: *And provided further,* That the court below may in its discretion require, as a condition of the appeal, an additional injunction bond.

Approved February 18, 1895.¹

¹ 28 U. S. Stat. at L., ch. 96, pp. 666, 667.

**ACT AMENDING SECTION 5, JUDICIARY ACT,
MARCH 3, 1891.**

AN ACT to withdraw from the supreme court jurisdiction of criminal cases not capital and confer the same on the circuit court of appeals.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of section five of the act entitled "An act to establish circuit courts of appeal and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, as reads, "in cases of conviction of a capital or otherwise infamous crime," be amended by striking out the words, "or otherwise infamous," so that the same will read, "in cases of conviction of a capital crime;" and that appeals or writs of error may be taken from the district courts or circuit courts to the proper circuit courts of appeals in cases of conviction of an infamous crime not capital: *Provided*, that no case now pending in the supreme court or in which an appeal on writ of error shall have been taken or sued out before the passage of this act shall be affected hereby, but in all such cases the jurisdiction of the supreme court shall remain and said supreme court shall proceed therein as if this act had not been passed.

Approved Janary 20, 1897.

**ACT AMENDING SECTION 7, JUDICIARY ACT,
MARCH 3, 1891**

AN ACT to amend the seventh section of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the seventh section of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March third, eighteen hundred and ninety-one, be amended so as to read as follows:

"SEC. 7. That where, upon a hearing in equity in a district court or a circuit court, or by a judge thereof in vacation, an injunction shall be granted or continued or a receiver appointed, by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction or appointing such receiver to the circuit court of appeals: *Provided*, That the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, or by the appellate court or a judge thereof, during the pendency of such appeal: *Provided further*, That the court below may in its discretion require as a condition of the appeal an additional bond."

Approved, June 6, 1900.¹

¹ 31 U. S. Stat. at L., ch. 803, pp. 660-661.

SUITS AGAINST THE GOVERNMENT.

AN ACT to provide for the bringing of suits against the government of the United States.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the court of claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon the constitution of the United States or any law of congress, except for pensions, or upon any regulation of an executive department, or upon any contract, expressed or implied, with the government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable: *Provided, however,* That nothing in this section shall be construed as giving to either of the courts herein mentioned jurisdiction to hear and determine claims growing out of the late civil war, and commonly known as "war claims," or to hear and determine other claims, which have heretofore been rejected, or reported on adversely by any court, department, or commission authorized to hear and determine the same.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the government of the United States against any claimant against the government in said court: *Provided,* that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made.

SEC. 2. That the district courts of the United States shall have concurrent jurisdiction with the court of claims as to all matters named in the preceding section where the amount of the claim does not exceed one thousand dollars, and the circuit courts of the United States shall have such concurrent juris-

diction in all cases where the amount of such claim exceeds one thousand dollars and does not exceed ten thousand dollars. All causes brought and tried under the provisions of this act shall be tried by the court without a jury.

SEC. 3. That whenever any person shall present his petition to the court of claims alleging that he is or has been indebted to the United States as an officer or agent thereof, or by virtue of any contract therewith, or that he is the guarantor, or surety, or personal representative of any officer, or agent, or contractor so indebted, or that he, or the person for whom he is such surety, guarantor, or personal representative has held any office or agency under the United States, or entered into any contract therewith, under which it may be or has been claimed that an indebtedness to the United States has arisen and exists, and that he or the person he represents has applied to the proper department of the government requesting that the account of such office, agency, or indebtedness may be adjusted and settled, and that three years have elapsed from the date of such application and said account still remains unsettled and unadjusted, and that no suit upon the same has been brought by the United States, said court shall, due notice first being given to the head of said department and to the attorney-general of the United States, proceed to hear the parties and to ascertain the amount, if any, due the United States on said account. The attorney-general shall represent the United States at the hearing of said cause. The court may postpone the same from time to time whenever justice shall require. The judgment of said court or of the supreme court of the United States, to which an appeal shall lie, as in other cases, as to the amount due, shall be binding and conclusive upon the parties. The payment of such amount so found due by the court shall discharge such obligation. An action shall accrue to the United States against such principal, or surety, or representative to recover the amount so found due, which may be brought at any time within three years after the final judgment of said court. Unless suit shall be brought within said time, such claim and the claim on the original indebtedness shall be forever barred.

SEC. 4. That the jurisdiction of the respective courts of the United States proceeding under this act, including the right of exception and appeal, shall be governed by the law now in

force, in so far as the same is applicable and not inconsistent with the provisions of this act; and the course of procedure shall be in accordance with the established rules of said respective courts, and of such additions and modifications thereof as said courts may adopt.

SEC. 5. That the plaintiff in any suit brought under the provisions of the second section of this act shall file a petition, duly verified with the clerk of the respective court having jurisdiction of the case, and in the district where the plaintiff resides. Such petition shall set forth the full name and residence of the plaintiff, the nature of his claim, and a succinct statement of the facts upon which the claim is based, the money or any other thing claimed, or the damages sought to be recovered, and praying the court for a judgment or decree upon the facts and law.

SEC. 6. That the plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of the same, by registered letter, to the attorney-general of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid, to appear and defend the interests of the government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case, to file a plea, answer, or demurrer on the part of the government, and to file a notice of any counter-claim, set-off, claim for damages, or other demand or defense whatsoever of the government in the premises: *Provided*, that should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof, unless he shall establish the same by proof satisfactory to the court.

SEC. 7. That it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein and the conclusions of the court upon all questions of law involved in the case, and

to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts.

SEC. 8. That in the trial of any suit brought under any of the provisions of this act, no person shall be excluded as a witness because he is a party to or interested in said suit; and any plaintiff or party in interest may be examined as a witness on the part of the government.

Section ten hundred and seventy-nine of the Revised Statutes is hereby repealed. The provisions of section ten hundred and eighty of the Revised Statutes shall apply to cases under this act.

SEC. 9. That the plaintiff or the United States, in any suit brought under the provisions of this act shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that behalf made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects, and as near as may be, to the statutes and rules of court governing appeals and writs of error in like causes.

SEC. 10. That when the findings of fact and the law applicable thereto have been filed in any case as provided in section six of this act, and the judgment or decree is adverse to the government, it shall be the duty of the district attorney to transmit to the attorney-general of the United States certified copies of all the papers filed in the cause, with a transcript of the testimony taken, the written findings of the court, and his written opinion as to the same; whereupon the attorney-general shall determine and direct whether an appeal or writ of error shall be taken or not; and when so directed the district attorney shall cause an appeal or writ of error to be perfected in accordance with the terms of the statutes and rules of practice governing the same: *Provided*, that no appeal or writ of error shall be allowed after six months from the judgment or decree in such suit. From the date of such final judgment or decree interest shall be computed thereon, at the rate of four per centum per annum, until the time when an appropriation is made for the payment of the judgment or decree.

SEC. 11. That the attorney-general shall report to congress, and at the beginning of each session of congress, the suits

under this act in which a final judgment or decree has been rendered, giving the date of each, and a statement of the costs taxed in each case.

SEC. 12. That when any claim or matter may be pending in any of the executive departments which involves controverted questions of fact or law, the head of such department, with the consent of the claimant, may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court of claims, and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall report its findings to the department by which it was transmitted.

SEC. 13. That in every case which shall come before the court of claims, or is now pending therein, under the provisions of an act entitled "An act to afford assistance and relief to congress and the executive departments in the investigation of claims and demands against the government," approved March third, eighteen hundred and eighty-three, if it shall appear to the satisfaction of the court, upon the facts established, that it has jurisdiction to render judgment or decree thereon under existing laws or under the provisions of this act, it shall proceed to do so, giving to either party such further opportunity for hearing as in its judgment justice shall require, and report its proceedings therein to either house of congress or to the department by which the same was referred to said court.

SEC. 14. That whenever any bill, except for a pension, shall be pending in either house of congress providing for the payment of a claim against the United States, legal or equitable, or for a grant, gift, or bounty to any person, the house in which such bill is pending may refer the same to the court of claims, who shall proceed with the same in accordance with the provisions of the act approved March third, eighteen hundred and eighty-three, entitled an "Act to afford assistance and relief to congress and the executive departments in the investigation of claims and demands against the government," and report to such house the facts in the case and the amount, where the same can be liquidated, including any facts bearing upon the question whether there has been delay or laches in presenting such claim or applying for such grant, gift, or bounty, and any facts bearing upon the question whether the bar of any statute or limitation should be removed, or which shall be claimed to

excuse the claimant for not having resorted to any established legal remedy.

SEC. 15. If the government of the United States shall put in issue the right of the plaintiff to recover, the court may, in its discretion, allow costs to the prevailing party from the time of joining such issue. Such costs, however, shall include only what is actually incurred for witnesses, and for summoning the same, and fees paid to the clerk of the court.

SEC. 16. That all laws and parts of laws inconsistent with this act are hereby repealed

Approved March 3, 1887.¹

¹ 24 U. S. Stat. at L., ch. 359, p. 505.

THE SHERMAN ANTI-TRUST ACT.

AN ACT to protect trade and commerce against unlawful restraints and monopolies.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the distretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any state or states or the District of Columbia, or with foreign nations, or between the District of Columbia and any state or states or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district

attorneys of the United States, in their respective districts, under the direction of the attorney-general, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

SEC. 5. Whenever it shall appear to the court before which any proceeding under section four of this act may be pending, that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not; and subpoenas to that end may be served in any district by the marshal thereof.

SEC. 6. Any property owned under any contract or by any combination, or pursuant to any conspiracy (and being the subject thereof) mentioned in section one of this act, and being in the course of transportation from one state to another, or to a foreign country, shall be forfeited to the United States, and may be seized and condemned by like proceedings as those provided by law for the forfeiture, seizure, and condemnation of property imported into the United States contrary to law.

SEC. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

SEC. 8. That the word "person," or "persons," wherever used in this act shall be deemed to include corporations and associations existing under or authorized by the laws of either the United States, the laws of any of the Territories, the laws of any State, or the laws of any foreign country.

Approved, July 2, 1890.¹

¹ 26 U. S. Stat. at L., ch. 647, p. 209.

THE ELKINS' ACT.

AN ACT to further regulate commerce with foreign nations and among the states.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That anything done or omitted to be done by a corporation common carrier, subject to the act to regulate commerce and the acts amendatory thereof which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts or under this act shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons except as such penalties are herein changed. The wilful failure upon the part of any carrier subject to said acts to file and publish the tariffs or rates and charges as required by said acts or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant or give or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in intersate or foreign commerce by any common carrier subject to said Act to regulate commerce and the acts amendatory thereto whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, or give or solicit, accept or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor,

and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars. In all convictions occurring after the passage of this act for offenses under said acts to regulate commerce, whether committed before or after the passage of this act, or for offenses under this section, no penalty shall be imposed on the convicted party other than the fine prescribed by law, imprisonment wherever now prescribed as part of the penalty being hereby abolished. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

In construing and enforcing the provisions of this section the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier acting within the scope of his employment shall in every case be also deemed to be the act, omission, or failure of such carrier as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereto, or participates in any rates so filed or published, that rate as against such carrier, its officers, or agents in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

SEC. 2. That in any proceeding for the enforcement of the provisions of the statutes relating to interstate commerce, whether such proceedings be instituted before the Interstate Commerce Commission or be begun originally in any circuit court of the United States, it shall be lawful to include as parties in addition to the carrier all persons interested in or affected by the rate, regulation, or practice under consideration, and inquiries, investigations, orders, and decrees may be made with reference to and against such additional parties in the same manner, to the same extent, and subject to the same pro-

visions as are or shall be authorized by law with respect to carriers.

SEC. 3. That whenever the Interstate Commerce Commission shall have reasonable ground for belief that any common carrier is engaged in the carriage of passengers or freight traffic between given points at less than the published rates on file, or is committing any discriminations forbidden by law, a petition may be presented alleging such facts to the circuit court of the United States sitting in equity having jurisdiction; and when the act complained of is alleged to have been committed or as being committed in part in more than one judicial district or State, it may be dealt with, inquired of, tried, and determined in either such judicial district or State, whereupon it shall be the duty of the court summarily to inquire into the circumstances, upon such notice and in such manner as the court shall direct and without the formal pleadings and proceedings applicable to ordinary suits in equity, and to make such other persons or corporations parties thereto as the court may deem necessary, and upon being satisfied of the truth of the allegations of said petition said court shall enforce an observance of the published tariffs or direct and require discontinuance of such discrimination by proper orders, writs, and process, which said orders, writs, and process may be enforceable as well against the parties interested in the traffic as against the carrier, subject to the right of appeal as now provided by law. It shall be the duty of the several district attorneys of the United States, whenever the Attorney-General shall direct, either of his own motion or upon the request of the Interstate Commerce Commission, to institute and prosecute such proceedings, and the proceedings provided for by this Act shall not preclude the bringing of suit for the recovery of damages by any party injured, or any other action provided by said Act approved February fourth, eighteen hundred and eighty-seven, entitled An Act to regulate commerce and the Acts amendatory thereof. And in proceedings under this Act and the Acts to regulate commerce the said courts shall have the power to compel the attendance of witnesses, both upon the part of the carrier and the shipper, who shall be required to answer on all subjects relating directly or indirectly to the matter in controversy, and to compel the production of all books and papers, both of the carrier and the shipper, which relate directly or indirectly to

such transaction; the claim that such testimony or evidence may tend to criminate the person giving such evidence shall not excuse such person from testifying or such corporation producing its books and papers, but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence documentary or otherwise in such proceeding: *Provided*, That the provisions of an Act entitled "An Act to expedite the hearing and determination of suits in equity pending or hereafter brought under the Act of July second, eighteen hundred and ninety, entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' 'An act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, or any other Acts having a like purpose that may be hereafter enacted, approved February eleventh, nineteen hundred and three," shall apply to any case prosecuted under the direction of the Attorney-General in the name of the Interstate Commerce Commission.

SEC. 4. That all Acts and parts of Acts in conflict with the provisions of this Act are hereby repealed, but such repeal shall not affect causes now pending nor rights which have already accrued, but such causes shall be prosecuted to a conclusion and such rights enforced in a manner heretofore provided by law and as modified by the provisions of this Act.

SEC. 5. That this Act shall take effect from its passage.

Approved, February 19, 1903.¹

¹ 32 U. S. Stat. at L., ch. 708, p. 847.

ACT AMENDING ACT TO REGULATE COMMERCE.

AN ACT to amend an act entitled "An act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, and all acts amendatory thereof, and to enlarge the powers of the Interstate Commerce Commission.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an Act entitled "An Act to regulate commerce," approved February fourth, eighteen hundred and eighty-seven, be amended so as to read as follows:

*"Sec. 1. That the provisions of this Act shall apply to any corporation or any person or persons engaged in the transportation of oil or other commodity, except water and except natural or artificial gas, by means of pipe lines, or partly by pipe lines and partly by railroad, or partly by pipe lines and partly by water, who shall be considered and held to be common carriers within the meaning and purpose of this Act, and to any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad (or partly by railroad and partly by water when both are used under a common control, management, or arrangement for a continuous carriage or shipment), from one State or Territory of the United States, or the District of Columbia, to any other State or Territory of the United States, or the District of Columbia, or from one place in a Territory to another place in the same Territory, or from any place in the United States to an adjacent foreign country, or from any place in the United States through a foreign country to any other place in the United States, and also to the transportation in like manner of property shipped from any place in the United States to a foreign country and carried from such place to a port of transshipment, or shipped from a foreign country to any place in the United States and carried to such place from a port of entry either in the United States or an adjacent foreign country: *Provided, however,* That the provisions of this Act shall not apply to the transportation of pass-*

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engers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any State or Territory as aforesaid.

“The term ‘common carrier’ as used in this Act shall include express companies and sleeping car companies. The term ‘railroad,’ as used in this Act, shall include all bridges and ferries used or operated in connection with any railroad, and also all the road in use by any corporation operating a railroad, whether owned or operated under a contract, agreement, or lease, and shall also include all switches, spurs, tracks, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, and also all freight depots, yards, and grounds used or necessary in the transportation or delivery of any of said property; and the term ‘transportation’ shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this Act to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto.

“All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable; and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

“No common carrier subject to the provisions of this Act, shall, after January first, nineteen hundred and seven, directly or indirectly, issue or give any interstate free ticket, free pass, or free transportation for passengers, except to its employees and their families, its officers, agents, surgeons, physicians, and attorneys at law; to ministers of religion, traveling secretaries of railroad Young Men’s Christian Associations, inmates of hospitals and charitable and eleemosynary institutions, and persons exclusively engaged in charitable and eleemosynary work; to indigent, destitute and homeless persons, and to such persons when transported by charitable societies or hospitals.

and the necessary agents employed in such transportation; to inmates of the National Homes or State Homes for Disabled Volunteer Soldiers, and of Soldiers' and Sailors' Homes, including those about to enter and those returning home after discharge and boards of managers of such Homes; to necessary care takers of live stock, poultry, and fruit; to employees on sleeping cars, express cars, and to linemen of telegraph and telephone companies; to Railway Mail Service employees, post-office inspectors, customs inspectors and immigration inspectors; to newsboys on trains, baggage agents, witnesses attending any legal investigation in which the common carrier is interested. persons injured in wrecks and physicians and nurses attending such persons: *Provided*, That this provision shall not be construed to prohibit the interchange of passes for the officers, agents, and employees of common carriers, and their families; nor to prohibit any common carrier from carrying passengers free with the object of providing relief in cases of general epidemic, pestilence, or other calamitous visitation. Any common carrier violating this provision shall be deemed guilty of a misdemeanor and for each offense, on conviction, shall pay to the United States a penalty of not less than one hundred dollars nor more than two thousand dollars, and any person, other than the persons excepted in this provision, who uses any such interstate free ticket, free pass, or free transportation, shall be subject to a like penalty. Jurisdiction of offenses under this provision shall be the same as that provided for offenses in an Act entitled 'An act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, and any amendment thereof.

"From and after May first, nineteen hundred and eight, it shall be unlawful for any railroad company to transport from any State, Territory, or the District of Columbia, to any other State, Territory, or the District of Columbia, or to any foreign country, any article or commodity, other than timber and the manufactured products thereof, manufactured, mined, or produced by it, or under its authority, or which it may own in whole, or in part, or in which it may have any interest direct or indirect except such articles or commodities as may be necessary and intended for its use in the conduct of its business as a common carrier.

"Any common carrier subject to the provisions of this Act,

upon application of any lateral, branch line or railroad, or of any shipper tendering interstate traffic for transportation, shall construct, maintain, and operate upon reasonable terms a switch connection with any such lateral branch line of railroad, or private side track which may be constructed to connect with its railroad, where such connection is reasonably practicable and can be put in with safety and will furnish sufficient business to justify the construction and maintenance of the same; and shall furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper. If any common carrier shall fail to install and operate any such switch or connection as aforesaid, on application therefor in writing by any shipper, such shipper may make complaint to the Commission, as provided in section thirteen of this Act, and the Commission shall hear and investigate the same and shall determine as to the safety and practicability thereof and justification and reasonable compensation therefor and the Commission may make an order, as provided in section fifteen of this Act, directing the common carrier to comply with the provisions of this section in accordance with such order, and such order shall be enforced as hereinafter provided for the enforcement of all other orders by the Commission, other than orders for the payment of money."

SEC. 2. That section six of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"SEC. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established. If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force,

and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

“Any common carrier subject to the provisions of this Act receiving freight in the United States to be carried through a foreign country to any place in the United States shall also in like manner print and keep open to public inspection, at every depot or office where such freight is received for shipment, schedules showing the through rates established and charged by such common carrier to all points in the United States beyond the foreign country to which it accepts freight for shipment; and any freight shipped from the United States through a foreign country into the United States the through rate on which shall not have been made public, as required by this Act, shall, before it is admitted into the United States from said foreign country, be subject to customs duties as if said freight were of foreign production.

“No change shall be made in the rates, fares, and charges or joint rates, fares, and charges which have been filed and published by any common carrier in compliance with the requirements of this section, except after thirty days’ notice to the Commission and to the public published as aforesaid, which shall plainly state the changes proposed to be made in the schedule then in force and the time when the changed rates, fares or charges will go into effect; and the proposed changes shall be shown by printing new schedules, or shall be plainly indicated upon the schedules in force at the time and kept open to public inspection: *Provided*, That the Commission may, in its discretion and for good cause shown, allow changes upon less than the

notice herein specified, or modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

“The names of the several carriers which are parties to any joint tariff shall be specified therein, and each of the parties thereto, other than the one filing the same, shall file with the Commission such evidence of concurrence therein or acceptance thereof as may be required or approved by the Commission, and where such evidence of concurrence or acceptance is filed it shall not be necessary for the carriers filing the same to also file copies of the tariffs in which they are named as parties.

“Every common carrier subject to this Act shall also file with said Commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of this Act to which it may be a party.

“The Commission may determine and prescribe the form in which the schedules required by this section to be kept open to public inspection shall be prepared and arranged and may change the form from time to time as shall be found expedient.

“No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided*, That wherever the word ‘carrier’ occurs in this Act it shall be held to mean ‘common carrier.’

“That in time of war or threatened war preference and precedence shall, upon the demand of the President of the

United States, be given, over all other traffic, to the transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

That section one of the Act entitled "An Act to further regulate commerce with foreign nations and among the States," approved February nineteenth, nineteen hundred and three, be amended so as to read as follows:

"That anything done or omitted to be done by a corporation common carrier, subject to the Act to regulate commerce and the Acts amendatory thereof, which, if done or omitted to be done by any director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said Acts or by this Act with reference to such persons, except as such penalties are herein changed. The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law, shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: *Pro-*

vided, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. Every violation of this section shall be prosecuted in any court of the United States having jurisdiction of crimes within the district in which such violation was committed, or through which the transportation may have been conducted; and whenever the offense is begun in one jurisdiction and completed in another it may be dealt with, inquired of, tried, determined, and punished in either jurisdiction in the same manner as if the offense had been actually and wholly committed therein.

“In construing and enforcing the provisions of this section, the act, omission, or failure of any officer, agent, or other person acting for or employed by any common carrier, or shipper, acting within the scope of his employment, shall in every case be also deemed to be the act, omission, or failure of such carrier or shipper as well as that of the person. Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

“Any person, corporation, or company who shall deliver property for interstate transportation to any common carrier, subject to the provisions of this Act, or for whom a consignor or consignee, any such carrier shall transport property from one State, Territory, or the District of Columbia to any other State, Territory, or the District of Columbia, or foreign country, who shall knowingly by employee, agent, officer, or otherwise, directly or indirectly, by or through any means or device whatsoever, receive or accept from such common carrier any sum of money or any other valuable consideration as a rebate

or offset against the regular charges for transportation of such property, as fixed by the schedules of rates provided for in this Act, shall in addition to any penalty provided by this Act forfeit to the United States a sum of money three times the amount of money so received or accepted and three times the value of any other consideration so received or accepted, to be ascertained by the trial court; and the Attorney-General of the United States is authorized and directed, whenever he has reasonable grounds to believe that any such person, corporation, or company, has knowingly received or accepted from any such common carrier any sum of money or other valuable consideration as a rebate or offset as aforesaid, to institute in any court of the United States of competent jurisdiction, a civil action to collect the said sum or sums so forfeited as aforesaid; and in the trial of said action all such rebates or other considerations so received or accepted for a period of six years prior to the commencement of the action, may be included therein, and the amount recovered shall be three times the total amount of money, or three times the total value of such consideration, so received, or accepted, or both, as the case may be."

SEC. 3. That section fourteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

"SEC. 14. That whenever an investigation shall be made by said Commission, it shall be its duty to make report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises; and in case damages are awarded such report shall include the findings of fact on which the award is made.

"All reports of investigations made by the Commission shall be entered of record, and a copy thereof shall be furnished to the party who may have complained, and to any common carrier that may have been complained of.

"The Commission may provide for the publication of its reports and decisions in such form and manner as may be best adapted for public information and use, and such authorized publications shall be competent evidence of the reports and decisions of the Commission therein contained in all courts of the United States and of the several States without any further proof or authentication thereof. The Commission may also cause to be printed for early distribution its annual reports."

SEC. 4. That section fifteen of said Act be amended so as to read as follows:

“SEC. 15. That the Commission is authorized and empowered and it shall be its duty, whenever, after full hearing upon a complaint made as provided in section thirteen of this Act, or upon complaint of any common carrier, it shall be of the opinion that any of the rates, or charges whatsoever, demanded, charged, or collected by any common carrier or carriers, subject to the provisions of this Act, for the transportation of persons or property as defined in the first section of this Act, or that any regulations or practices whatsoever of such carrier or carriers affecting such rates, are unjust or unreasonable, or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this Act, to determine and prescribe what will be the just and reasonable rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged; and what regulation or practice in respect to such transportation is just, fair, and reasonable to be thereafter followed; and to make an order that the carrier shall cease and desist from such violation, to the extent to which the Commission find the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation in excess of the maximum rate or charge so prescribed, and shall conform to the regulation or practice so prescribed. All orders of the Commission, except orders for the payment of money, shall take effect within such reasonable time, not less than thirty days, and shall continue in force for such period of time, not exceeding two years, as shall be prescribed in the order of the Commission, unless the same shall be suspended or modified or set aside by the Commission or be suspended or set aside by a court of competent jurisdiction. Whenever the carrier or carriers, in obedience to such order of the Commission or otherwise, in respect to joint rates, fares, or charges, shall fail to agree among themselves upon the apportionment or division thereof, the Commission may after hearing make a supplemental order prescribing the just and reasonable proportion of such joint rate to be received by each carrier party thereto, which order shall take effect as a part of the original order.

“The Commission may also, after hearing on a complaint, establish through routes and joint rates and the maximum to be

charged and prescribe the division of such rates as hereinbefore provided, and the terms and conditions under which such through routes shall be operated, when that may be necessary to give effect to any provision of this Act, and the carriers complained of have refused or neglected to voluntarily establish such through routes and joint rates, provided no reasonable or satisfactory through route exists, and this provision shall apply when one of the connecting carriers is a water line.

“If the owner of property transported under this Act directly or indirectly renders any service connected with such transportation, or furnishes any instrumentality used therein, the charge and allowance therefor shall be no more than is just and reasonable, and the Commission may, after hearing on a complaint, determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the service so rendered or for the use of the instrumentality so furnished, and fix the same by appropriate order, which order shall have the same force and effect and be enforced in like manner as the orders above provided for in this section.

“The foregoing enumeration of powers shall not exclude any power which the Commission would otherwise have in the making of an order under the provisions of this Act.”

SEC. 5. That section sixteen of said Act, as amended March second, eighteen hundred and eighty-nine, be amended so as to read as follows:

“SEC. 16. That if, after hearing on a complaint made as provided in section thirteen of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named.

“If the carrier does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may file in the circuit court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. Such suit shall proceed in all respects like other civil suits for

damages, except that on the trial of such suit the findings and order of the Commission shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the circuit court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, and a petition for the enforcement of an order for the payment of money shall be filed in the circuit court within one year from the date of the order, and not after: *Provided*, That claims accrued prior to the passage of this Act may be presented within one year.

“In such suits all parties in whose favor the Commission may have made an award for damages by a single order may be joined as plaintiffs, and all of the carriers parties to such order awarding such damages may be joined as defendants, and such suit may be maintained by such joint plaintiffs and against such joint defendants in any district where any one of such joint plaintiffs could maintain such suit against any one of such joint defendants; and service of process against any one of such defendants as may not be found in the district where the suit is brought may be made in any district where such defendant carrier has its principal operating office. In case of such joint suit the recovery, if any, may be by judgment in favor of any one of such plaintiffs, against the defendant found to be liable to such plaintiff.

“Every order of the Commission shall be forthwith served by mailing to any one of the principal officers or agents of the carrier at his usual place of business a copy thereof; and the registry mail receipt shall be prima facie evidence of the receipt of such order by the carrier in due course of mail.

“The Commission shall be authorized to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

“It shall be the duty of every common carrier, its agents and employees, to observe and comply with such orders so long as the same shall remain in effect.

“Any carrier, any officer, representative, or agent of a car-

rier, or any receiver, trustee, lessee, or agent of either of them, who knowingly fails or neglects to obey any order made under the provisions of section fifteen of this Act, shall forfeit to the United States the sum of five thousand dollars for each offense. Every distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense.

“The forfeiture provided for in this Act shall be payable into the treasury of the United States, and shall be recoverable in a civil suit in the name of the United States, brought in the district where the carrier has its principal operating office, or in any district through which the road of the carrier runs.

“It shall be the duty of the various district attorneys, under the direction of the Attorney-General of the United States, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States. The Commission may, with the consent of the Attorney-General, employ special counsel in any proceeding under this Act, paying the expenses of such employment out of its own appropriation.

“If any carrier fails or neglects to obey any order of the Commission, other than for the payment of money, while the same is in effect, any party injured thereby, or the Commission in its own name, may apply to the circuit court in the district where such carrier has its principal operating office, or in which the violation or disobedience of such order shall happen, for an enforcement of such order. Such application shall be by petition, which shall state the substance of the order and the respect in which the carrier has failed of obedience, and shall be served upon the carrier in such manner as the court may direct, and the court shall prosecute such inquiries and make such investigations, through such means as it shall deem needful in the ascertainment of the facts at issue or which may arise upon the hearing of such petition. If, upon such hearing as the court may determine to be necessary, it appears that the order was regularly made and duly served, and that the carrier is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction, or other proper process, mandatory or otherwise, to restrain such carrier, its officers, agents, or representatives, from further disobedience of such order, or to enjoin upon it, or them, obedience to the same; and

in the enforcement of such process the court shall have those powers ordinarily exercised by it in compelling obedience to its writs of injunction and mandamus.

“From any action upon such petition an appeal shall lie by either party to the Supreme Court of the United States, and in such court the case shall have priority in hearing and determination over all other causes except criminal causes, but such appeal shall not vacate or suspend the order appealed from.

“The venue of suits brought in any of the circuit courts of the United States against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission shall be in the district where the carrier against whom such order or requirement may have been made has its principal operating office and may be brought at any time after such order is promulgated. And if the order or requirement has been made against two or more carriers then in the district where any one of said carriers has its principal operating office, and if the carrier has its principal operating office in the District of Columbia then the venue shall be in the district where said carrier has its principal office; and jurisdiction to hear and determine such suits is hereby vested in such courts. The provisions of ‘An Act to expedite the hearing and determination of suits in equity, and so forth,’ approved February eleventh, nineteen hundred and three, shall be, and are hereby, made applicable to all such suits, including the hearing on an application for a preliminary injunction, and are also made applicable to any proceeding in equity to enforce any order or requirement of the Commission, or any of the provisions of the Act to regulate commerce approved February fourth, eighteen hundred and eighty-seven, and all Acts amendatory thereof or supplemental thereto. It shall be the duty of the Attorney-General in every such case to file the certificate provided for in said expediting Act of February eleventh, nineteen hundred and three, as necessary to the application of the provisions thereof, and upon appeal as therein authorized to the Supreme Court of the United States, the case shall have in such court priority in hearing and determination over all other causes except criminal causes: *Provided*, That no injunction, interlocutory order or decree suspending or restraining the enforcement of an order of the Commission shall be granted except on hearing after not less than five days’ notice to the Commission. An appeal may be taken

from any interlocutory order or decree granting or continuing an injunction in any suit, but shall lie only to the Supreme Court of the United States: *Provided further*, That the appeal must be taken within thirty days from the entry of such order or decree and it shall take precedence in the appellate court over all other causes, except causes of like character and criminal causes.

“The copies of schedules and tariffs of rates, fares, and charges, and of all contracts, agreements, or arrangements, between common carriers filed with the Commission as herein provided, and the statistics, tables, and figures contained in the annual reports of carriers made to the Commission, as required by the provisions of this Act, shall be preserved as public records in the custody of the secretary of the Commission, and shall be received as prima facie evidence of what they purport to be for the purpose of investigations by the Commission and in all judicial proceedings; and copies of or extracts from any of said schedules, tariffs, contracts, agreements, arrangements, or reports made public records as aforesaid, certified by the secretary under its seal, shall be received in evidence with like effect as the originals.”

SEC. 6. That a new section be added to said Act immediately after section sixteen, to be numbered as section sixteen a, as follows:

“SEC. 16a. That after a decision, order, or requirement has been made by the Commission in any proceeding any party thereto may at any time make application for rehearing of the same, or any matter determined therein, and it shall be lawful for the Commission in its discretion to grant such a rehearing if sufficient reason therefor be made to appear. Applications for rehearing shall be governed by such general rules as the Commission may establish. No such application shall excuse any carrier from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. In case a rehearing is granted the proceedings thereupon shall conform as nearly as may be to the proceedings in an original hearing, except as the Commission may otherwise direct; and if, in its judgment, after such rehearing and the consideration of all facts, including those arising since the former hearing, it shall appear that the origi-

nal decision, order, or requirement is in any respect unjust or unwarranted, the Commission may reverse, change, or modify the same accordingly. Any decision, order, or requirement made after such rehearing, reversing, changing, or modifying the original determination shall be subject to the same provisions as an original order."

SEC. 7. That section twenty of said Act be amended so as to read as follows:

"SEC. 20. That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept.

"Said detailed reports shall contain all the required statistics for the period of twelve months ending on the thirtieth day of June in each year, and shall be made out under oath and filed

with the Commission, at its office in Washington, on or before the thirtieth day of September then next following, unless additional time be granted in any case by the Commission; and if any carrier, person, or corporation subject to the provisions of this Act shall fail to make and file said annual reports within the time above specified, or within the time extended by the Commission for making and filing the same, or shall fail to make specific answer to any question authorized by the provisions of this section within thirty days from the time it is lawfully required so to do, such parties shall forfeit to the United States the sum of one hundred dollars for each and every day it shall continue to be in default with respect thereto. The Commission shall also have authority to require said carriers to file monthly reports of earnings and expenses or special reports within a specified period, and if any such carrier shall fail to file such reports within the time fixed by the Commission it shall be subject to the forfeitures last above provided.

“Said forfeitures shall be recovered in the manner provided for the recovery of forfeitures under the provisions of this Act.

“The oath required by this section may be taken before any person authorized to administer an oath by the laws of the State in which the same is taken.

“The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records and memoranda of the movement of traffic as well as the receipts and expenditures of moneys. The Commission shall at all times have access to all accounts, records, and memoranda kept by carriers subject to this Act, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda kept by such carriers. This provision shall apply to receivers of carriers and operating trustees.

“In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as are kept to the inspection of the Commission or any of its

authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act.

“Any person who shall willfully make any false entry in the accounts of any book of accounts or in any record or memoranda kept by a carrier, or who shall willfully destroy, mutilate, alter, or by any other means or device, falsify the record of any such account, record, or memoranda, or who shall willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the carrier’s business, or shall keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, shall be deemed guilty of a misdemeanor and shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not less than one thousand dollars nor more than five thousand dollars, or imprisonment for a term not less than one year nor more than three years, or both such fine and imprisonment.

“Any examiner who divulges any fact or information which may come to his knowledge during the course of such examination, except in so far as he may be directed by the Commission or by a court or judge thereof, shall be subject, upon conviction in any court of the United States of competent jurisdiction, to a fine of not more than five thousand dollars or imprisonment for a term not exceeding two years, or both.

“That the circuit and district courts of the United States shall have jurisdiction, upon the application of the Attorney-General of the United States at the request of the Commission, alleging a failure to comply with or a violation of any of the provisions of said Act to regulate commerce or of any Act supplementary thereto or amendatory thereof by any common carrier, to issue a writ or writs of mandamus commanding such common carrier to comply with the provisions of said Acts, or any of them.

“And to carry out and give effect to the provisions of said Acts, or any of them, the Commission is hereby authorized to employ special agents or examiners who shall have power to administer oaths, examine witnesses, and receive evidence.

“That any common carrier, railroad, or transportation company receiving property for transportation from a point in one State to a point in another State shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed: *Provided*, That nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law.

“That the common carrier, railroad, or transportation company issuing such receipt or bill of lading shall be entitled to recover from the common carrier, railroad, or transportation company on whose line the loss, damage, or injury shall have been sustained the amount of such loss, damage, or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment, or transcript thereof.”

SEC. 8. That a new section be added to said Act at the end thereof, to be numbered as section twenty-four, as follows:

“SEC. 24. That the Interstate Commerce Commission is hereby enlarged so as to consist of seven members with terms of seven years, and each shall receive ten thousand dollars compensation annually. The qualifications of the Commissioners and the manner of payment of their salaries shall be as already provided by law. Such enlargement of the Commission shall be accomplished through appointment by the President, by and with the advice and consent of the Senate, of two additional Interstate Commerce Commissioners, one for a term expiring December thirty-first, nineteen hundred and eleven, one for a term expiring December thirty-first, nineteen hundred and twelve. The terms of the present Commissioners, or of any successor appointed to fill a vacancy caused by the death or resignation of any of the present Commissioners, shall expire as heretofore provided by law. Their successors and the successors of the additional Commissioners herein provided for shall be appointed for the full term of seven years, except that any person appointed to fill a vacancy shall be appointed only for the unexpired term of the Commissioner whom he shall

succeed. Not more than four Commissioners shall be appointed from the same political party.”

SEC. 9. That all existing laws relating to the attendance of witnesses and the production of evidence and the compelling of testimony under the Act to regulate commerce and all Acts amendatory thereof shall apply to any and all proceedings and hearings under this Act.

SEC. 10. That all laws and parts of laws in conflict with the provisions of this Act are hereby repealed, but the amendments herein provided for shall not affect causes now pending in courts of the United States, but such causes shall be prosecuted to a conclusion in the manner heretofore provided by law.

SEC. 11. That this Act shall take effect and be in force from and after its passage.

Approved, June 29, 1906.¹

¹ 34 U. S. Stat. at L., ch. 3951, p. 584.

THE SAFETY APPLIANCES ACT.

AN ACT to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce to equip their cars with automatic couplers and continuous brakes and their locomotives with driving-wheel brakes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any common carrier engaged in interstate commerce by railroad to use on its line any locomotive engine in moving interstate traffic not equipped with a power driving wheel brake and appliances for operating the train-brake system, or to run any train in such traffic after said date that has not a sufficient number of cars in it so equipped with power or train brakes that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for that purpose.

SEC. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars.

SEC. 3. That when any person, firm, company, or corporation engaged in interstate commerce by railroad shall have equipped a sufficient number of its cars so as to comply with the provisions of section one of this act, it may lawfully refuse to receive from connecting lines of road or shippers any cars not equipped sufficiently, in accordance with the first section of this act, with such power or train brakes as will work and readily interchange with the brakes in use on its own cars, as required by this act.

SEC. 4 That from and after the first day of July, eighteen hundred and ninety-five, until otherwise ordered by the Interstate Commerce Commission, it shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars.

SEC. 5. That within ninety days from the passage of this act the American Railway Association is authorized hereby to designate to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicular from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and shall fix a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars. Upon their determination being certified to the Interstate Commerce Commission, said Commission shall at once give notice of the standard fixed upon to all common carriers, owners, or lessees engaged in interstate commerce in the United States by such means as the Commission may deem proper. But should said association fail to determine a standard as above provided, it shall be the duty of the Interstate Commerce Commission to do so, before July first, eighteen hundred and ninety-four, and immediately to give notice thereof as aforesaid. And after July first, eighteen hundred and ninety-five, no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard above provided for.

SEC. 6. That any such common carrier using any locomotive engine, running any train, or hauling or permitting to be hauled or used on its line any car in violation of any of the provisions of this act, shall be liable to a penalty of one hundred dollars for each and every such violation, to be recovered in a suit or suits to be brought by the United States district attorney in the district court of the United States having jurisdiction in the locality where such violation shall have been committed, and it shall be the duty of such district attorney to bring such suits upon duly verified information being lodged with him of such violation having occurred. And it shall also be the duty of the Interstate Commerce Commission to lodge with the proper district attorneys information of any such violations as may

come to its knowledge: *Provided*, That nothing in this act contained shall apply to trains composed of four wheel cars or to locomotives used in hauling such trains.

SEC. 7. That the Interstate Commerce Commission may from time to time upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of this act.

SEC. 8. That any employee of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge.

Approved, March 2, 1893.¹

¹ 27 U. S. Stat. at L. ch. 196, pp, 531, 532.

APPENDIX III.

RULES OF THE SUPREME COURT OF THE UNITED STATES.

CLERK.

I

1. The clerk of this court shall reside and keep the office at the seat of the national government, and he shall not practice, either as attorney or counselor, in this court, or in any other court, while he shall continue to be clerk of this court.

2. The clerk shall not permit any original record or paper to be taken from the court-room, or from the office, without an order from the court, except as provided by Rule 10.

ATTORNEYS AND COUNSELORS.

II

1. It shall be requisite to the admission of attorneys or counselors to practice in this court, that they shall have been such for three years past in the supreme courts of the states to which they respectively belong, and that their private and professional character shall appear to be fair.

2. They shall respectively take and subscribe the following oath or affirmation, viz.:

“I, ———, do solemnly swear [or affirm] that I will demean myself, as an attorney and counselor of this court, uprightly, and according to law; and that I will support the constitution of the United States.”

PRACTICE.

III

This court considers the former practice of the courts of king's bench and of chancery, in England, as affording outlines for the practice of this court: and will, from time to time, make such alterations therein as circumstances may render necessary.

BILL OF EXCEPTIONS.

IV

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exceptions to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts; and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

PROCESS.

V

1. All process of this court shall be in the name of the President of the United States, and shall contain the Christian names, as well as the surnames, of the parties.

2. When process at common law or in equity shall issue against a state, the same shall be served on the governor, or chief executive magistrate, and attorney-general of such state.

3. Process of subpoena, issuing out of this court, in any suit in equity, shall be served on the defendant sixty days before the return-day of the said process; and if the defendant, on such service of the subpoena, shall not appear at the return-day, the complainant shall be at liberty to proceed *ex parte*.

MOTION.

VI

1. All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

2. One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

3. No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

4. All motions to dismiss writs of error and appeals, except motions to docket and dismiss under Rule 9, must be submitted in the first instance on printed briefs or arguments. If the court desires further argument on that subject, it will be or-

dered in connection with the hearing on the merits. The party moving to dismiss shall serve notice of the motion, with a copy of his brief of argument, on the counsel for plaintiff in error or appellant of record in this court, at least three weeks before the time fixed for submitting the motion, in all cases except where the counsel to be notified resides west of the Rocky Mountains, in which case the notice shall be at least thirty days. Affidavits of the deposit in the mail of the notice and brief to the proper address of the counsel to be served, duly post-paid, at such time as to reach him by due course of mail, the three weeks or thirty days before the time fixed by the notice, will be regarded as *prima facie* evidence of service on counsel who reside without the District of Columbia. On proof of such service, the motion will be considered, unless, for satisfactory reasons, further time be given by the court to either party.

5. There may be united, with a motion to dismiss a writ of error or an appeal, a motion to affirm on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument.

6. The court will not hear arguments on Saturday (unless for special cause it shall order to the contrary), but will devote that day to the other business of the court. The motion-day shall be Monday of each week; and motions not required by the rules of the court to be put on the docket shall be entitled to preference immediately after the reading of opinions, if such motions shall be made before the court shall have entered upon the hearing of a case upon the docket.

LAW LIBRARY.

VII

1. During the session of the court, any gentleman of the bar having a case on the docket, and wishing to use any book or books in the law library, shall be at liberty, upon application to the clerk of the court, to receive an order to take the same (not exceeding at any one time three) from the library, he being thereby responsible for the due return of the same within a reasonable time, or when required by the clerk. It shall be the duty of the clerk to keep, in a book for that pur-

pose, a record of all books so delivered, which are to be charged against the party receiving the same. And in case the same shall not be so returned, the party receiving the same shall be responsible for and forfeit and pay twice the value thereof, and also one dollar per day for each day's detention beyond the limited time.

2. The clerk shall deposit in the law library to be there carefully preserved, one copy of the printed record in every case submitted to the court for its consideration, and of all printed motions, briefs, or arguments filed therein.

3. The marshal shall take charge of the books of the court, together with such of the duplicate law-books as congress may direct to be transferred to the court, and arrange them in the conference-room, which he shall have fitted up in a proper manner; and he shall not permit such books to be taken therefrom by any one except the justices of the court.

WRIT OF ERROR, RETURN AND RECORD.

VIII

1. The clerk of the court to which any writ of error may be directed shall make return of the same, by transmitting a true copy of the record, and of the assignment of errors, and of all proceedings in the case, under his hand and the seal of the court.

2. In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

3. No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

4. Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit court, or district court exercising circuit court jurisdiction, that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper, and this court will receive and

consider such original papers in connection with the transcript of the proceedings.

5. All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

6. The record in cases of admiralty and maritime jurisdiction, when under the requirements of law the facts have been found in the court below, and the power of review is limited to the determination of questions of law arising on the record, shall be confined to the pleadings, the findings of fact, and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.

DOCKETING CASES.

IX

1. It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return-day, whether in vacation or in term time. But, for good cause shown, the justice or judge who signed the citation, or any justice of this court, may enlarge the time, by or before its expiration, the order of enlargement to be filed with the clerk of this court. If the plaintiff in error or appellant shall fail to comply with this rule, the defendant in error or appellee may have the cause docketed and dismissed upon producing a certificate, whether in term time or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.

2. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court; and, if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument.

3. Upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the party docketing the case shall be entered.

4. In all cases where the period of thirty days is mentioned in Rule 8, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Nevada, Washington, New Mexico, Utah, Arizona, Montana, Wyoming, North Dakota, South Dakota, Alaska and Idaho.

PRINTING RECORDS.

X

1. In all cases the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

2. The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer and supervising the printing, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached in the regular call of the docket, after March 1, 1884, the case shall be dismissed.

3. Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed, under his supervision, for the use of the court and of counsel.

4. In case of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers, sent up under Rule 8, section 4, as are necessary to be printed; and of the whole record in cases of original jurisdiction.

5. The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the justices and the reporter, from time to time, as required, and a copy to the counsel for the respective parties.

6. If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and

paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost of the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

7. In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of printing the record and of the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

8. Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of the bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

9. The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within ninety days thereafter, may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

The fees of the clerk under Rule 24, section 7, shall be computed, as at present, on the folios in the record as filed, and shall be in full for the performance of his duties in the execution hereof.

TRANSLATIONS.

XI

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceedings in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed; but the case shall be reported to this court by the clerk, and the court will thereupon remand it to the inferior court, in order that a translation may be there supplied and inserted in the record.

FURTHER PROOF

XII

1. In all cases where further proof is ordered by the court, the depositions which may be taken shall be by a commission, to be issued from this court, or from any circuit court of the United States.

2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories, to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: *Provided, however*, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where by law it is admissible.

OBJECTIONS TO EVIDENCE IN THE RECORD.

XIII

In all cases of equity or admiralty jurisdiction, heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit found in the record as evidence, unless objection was

taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

CERTIORARI.

XIV

No *certiorari* for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

DEATH OF A PARTY.

XV

1. Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain an order that unless such representatives shall become parties within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ or error or appeal dismissed; and if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and on hearing have the judgment or decree reversed, if it be erroneous: *Provided, however*, that a copy of every such order shall be printed in some newspaper of general circulation within the state, territory, or district from which the case is brought, for three successive weeks, at least sixty days before the beginning of the term of the supreme court then next ensuing.

2. When the death of a party is suggested, and the representatives of the deceased do not appear by the tenth day of the second term next succeeding the suggestion, and no meas-

ures are taken by the opposite party within that time to compel their appearance, the case shall abate.

3. When either party to a suit in a circuit court of the United States shall desire to prosecute a writ of error or appeal to the supreme court of the United States, from any final judgment or decree, rendered in the circuit court, and at the time of suing out such writ of error or appeal the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some state or territory of the United States, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the commencement of the term to which such writ of error or appeal is returnable, the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered said judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some state or territory of the United States, and stating therein the name and character of such representative, and the state or territory in which such representative resides; and, upon such suggestion, he may, on motion, obtain an order that, unless such representative shall make himself a party within the first ten days of the ensuing term of the court, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if the same be erroneous: *Provided, however,* That a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least sixty days before the beginning of the term of the supreme court then next ensuing: *And provided, also,* That in every such case if the representative of the deceased party does not appear by the tenth day of the term next succeeding said suggestion, and the measures above provided to compel the appearance of such representative have not

been taken within time as above required, by the opposite party, the case shall abate: *And provided, also*, That the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

NO APPEARANCE OF PLAINTIFF

XVI

Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed, or may open the record and pray for an affirmance.

NO APPEARANCE OF DEFENDANT.

XVII

Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

NO APPEARANCE OF EITHER PARTY.

XVIII

When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

NEITHER PARTY READY AT SECOND TERM.

XIX

When a case is called for argument at two successive terms, and upon the call at the second term neither party is prepared to argue it, it shall be dismissed at the cost of the plaintiff, unless sufficient cause is shown for further postponement.

PRINTED ARGUMENTS.

XX

1. In all cases brought here on writ of error, appeal, or otherwise, the court will receive printed arguments without regard to the number of the case on the docket, if the counsel on both sides shall choose to submit the same within the first ninety days of the term; and, in addition, appeals from the court of

claims may be submitted by both parties within thirty days after they are docketed, but not after the first day of April; but twenty-five copies of the arguments, signed by attorneys or counselors of this court, must be first filed.

2. When a case is reached in the regular call of the docket, and a printed argument shall be filed for one or both parties, the case shall stand on the same footing as if there were an appearance by counsel.

3. When a case is taken up for trial upon the regular call of the docket, and argued orally in behalf of only one of the parties, no printed argument for the opposite party will be received, unless it is filed before the oral argument begins, and the court will proceed to consider and decide the case upon the *ex parte* argument.

4. No brief or argument will be received, either through the clerk or otherwise, after a case has been argued or submitted, except upon leave granted in open court after notice to opposing counsel.

BRIEFS.

XXI

1. The counsel for plaintiff in error or appellant shall file with the clerk of the court, at least six days before the case is called for argument, twenty-five copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

2. This brief shall contain, in the order here stated—

(1) A concise abstract, or statement of the case, presenting succinctly the questions involved and the manner in which they are raised.

(2) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and in cases brought up by appeal the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be instructions given or instructions refused. When the error

alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(3) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a state is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

3. The counsel for a defendant in error or an appellee shall file with the clerk twenty-five printed copies of his argument, at least three days before the case is called for hearing. His brief shall be of like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.

4. When there is no assignment of errors, as required by section 997 of the Revised Statutes, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

5. When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

6. When no oral argument is made for one of the parties, only one counsel will be heard for the adverse party.

ORAL ARGUMENTS.

XXII

1. The plaintiff or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

2. Only two counsel will be heard for each party on the argument of a case.

3. Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be appor-

tioned between the counsel on the same side, at their discretion: *Provided, always,* That a fair opening of the case shall be made by the party having the opening and closing arguments.

INTEREST.

XXIII

1. In cases where a writ of error is prosecuted to this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied, from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state where such judgment is rendered.

2. In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

3. The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

4. In cases in admiralty damages and interest may be allowed if specially directed by the court.

COSTS.

XXIV

1. In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

2. In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

3. In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court. The cost of the transcript of the record from the court below shall be a part of such costs, and be taxable in that court as costs in the case.

4. Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

5. In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

6. When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

7. In pursuance of the act of March 3, 1883, authorizing and empowering this court to prepare a table of fees to be charged by the clerk of this court, the following table is adopted:

For docketing a case and filing and indorsing the transcript of the record, five dollars.

For entering an appearance, twenty-five cents.

For entering a continuance, twenty-five cents.

For filing a motion, order, or other paper, twenty-five cents.

For entering any rule, or for making or copying any record or other paper, twenty cents per folio of each one hundred words.

For transferring each case to a subsequent docket and indexing the same, one dollar.

For entering a judgment or decree, one dollar.

For every search of the records of the court, one dollar.

For a certificate and seal, two dollars.

For receiving, keeping, and paying money in pursuance of any statute or order of court, two per cent. on the amount so received, kept, and paid.

For an admission to the bar and certificate under seal, ten dollars.

For preparing the record or a transcript thereof for the printer, indexing the same, supervising the printing and distributing the printed copies to the justices, the reporter, the law library, and the parties or their counsel, fifteen cents per folio.

For making a manuscript copy of the record, when required under Rule 10, twenty cents per folio, but nothing in addition for supervising the printing.

For issuing a writ of error and accompanying papers, five dollars.

For a mandate or other process, five dollars.

For filing briefs, five dollars for each party appearing.

For every copy of any opinion of the court or any justice thereof, certified under seal, one dollar for every printed page, but not to exceed five dollars in the whole for any copy..

OPINIONS OF THE COURT.

XXV

1. All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded. And it shall be the duty of the clerk to cause the same to be forthwith recorded, and to deliver a copy to the reporter as soon as the same shall be recorded.

2. The original opinions of the court shall be filed with the clerk of this court for preservation.

3. Opinions printed under the supervision of the justices delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

CALL AND ORDER OF THE DOCKET.

XXVI

1. The court, on the second day in each term, will commence calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the term in the same order (except as hereinafter provided); and if the parties, or either of them, shall be ready when the case is called, the same will be heard; and if neither party shall be ready to proceed in the argument, the case shall go down to the foot of the docket, unless some good and satisfactory reason to the contrary shall be shown to the court.

2. Ten cases only shall be considered as liable to be called on each day during the term. But on the coming in of the court on each day the entire number of such ten cases will be called, with a view to the disposition of such of them as are not to be argued.

3. Criminal cases may be advanced by leave of the court on motion of either party.

4. Cases once adjudicated by this court upon the merits, and

again brought up by writ of error or appeal, may be advanced by leave of the court on motion of either party.

5. Revenue and other cases in which the United States are concerned, which also involve or affect some matter of general public interest, may also by leave of the court be advanced on motion of the attorney-general.

6. All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the reasons for the application.

7. No other case will be taken up out of the order on the docket, or be set down for any particular day, except under special and peculiar circumstances to be shown to the court. Every case which shall have been called in its order and passed and put at the foot of the docket shall, if not again reached during the term it was called, be continued to the next term of the court.

8. Two or more cases, involving the same question, may, by the leave of the court, be heard together, but they must be argued as one case.

9. If, after a case has been passed under circumstances which do not place it at the foot of the docket, the parties shall desire to have it heard, they may file with the clerk their joint request to that effect, and the case shall then be by him reinstated for call ten cases after that under argument, or next to be called at the end of the day the request is filed. If the parties will not unite in such a request, either may move to take up the case, and it shall then be assigned to such place upon the docket as the court may direct.

10. No stipulation to pass a case without placing it at the foot of the docket will be recognized as binding upon the court. A case can only be so passed upon application made and leave granted in open court.

ADJOURNMENT.

XXVII

The court will, at every term, announce on what day it will adjourn at least ten days before the time which shall be fixed upon, and the court will take up no case for argument, nor receive any case upon printed briefs, within three days next before the day fixed upon for adjournment

DISMISSING CASES IN VACATION.

XXVIII

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall in vacation, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

SUPERSEDEAS.

XXIX

Supersedeas bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, as in case of capture or seizure, or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit, and just damages for delay, and costs and interest on the appeal.

REHEARING.

XXX

A petition for rehearing after judgment can be presented only at the term at which judgment is entered, unless by special leave granted during the term; and must be printed and briefly and distinctly state its grounds, and be supported by

certificate of counsel; and will not be granted, or permitted to be argued, unless a justice who concurred in the judgment desires it, and a majority of the court so determines.

FORM OF PRINTED RECORDS AND BRIEFS.

XXXI

All records, arguments, and briefs, printed for the use of the court, must be in such form and size that they can be conveniently bound together, so as to make an ordinary octavo volume; and, as well as all quotations contained therein, and the covers thereof, must be printed in clear type (never smaller than small pica) and on unglazed paper.

WRITS OF ERROR AND APPEALS UNDER THE ACT OF FEBRUARY 25, 1889, CHAPTER 236, OR UNDER SECTION 5 OF THE ACT OF MARCH 3, 1891, CHAPTER 517.

XXXII

Cases brought to this court by writ of error or appeal, under the act of February 25, 1889, chapter 236, or under section 5 of the act of March 3, 1891, chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion, and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals.

MODELS, DIAGRAMS, AND EXHIBITS OF MATERIALS.

XXXIII

1. Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least one month before the case is heard or submitted.

2. All models, diagrams, and exhibits of material, placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

CUSTODY OF PRISONERS ON HABEAS CORPUS

XXXIV

1. Pending an appeal from the final decision of any court or judge declining to grant the writ of *habeas corpus*, the custody of the prisoner shall not be disturbed.

2. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance as hereinafter provided.

3. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

ASSIGNMENT OF ERRORS.

XXXV

1. Where an appeal or a writ of error is taken from a district court or a circuit court direct to this court, under section 5 of the act entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, the plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the assignment of errors shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. Such assignment of errors shall form part of the transcript of the record, and be printed with it. When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned.

2. The plaintiff in error or appellant shall cause the record to be printed, according to the provisions of sections 2, 3, 4, 5, 6, and 9, of rule 10.

APPEALS AND WRITS OF ERROR.

XXXVI

1. An appeal or a writ of error from a circuit court or a district court direct to this court, in the cases provided for in sections 5 and 6 of the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891, may be allowed, in term time or in vacation, by any justice of this court, or by any circuit judge within his circuit, or by any district judge within his district, and the proper security be taken and the citation signed by him, and he may also grant a *supersedeas* and stay of execution or of proceedings, pending such writ of error or appeal.

2. Where such writ of error is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie under said sections 5 and 6, the circuit court or district court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

CASES FROM CIRCUIT COURT OF APPEALS.

XXXVII

1. Where, under section 6 of the said act, a circuit court of appeals shall certify to this court a question or proposition of law, concerning which it desires the instruction of this court for its proper decision, the certificate shall contain a proper statement of the facts on which such question or proposition of law arises.

2. If application is thereupon made to this court that the whole record and cause may be sent up to it for its consideration, the party making such application shall, as a part thereof, furnish this court with a certified copy of the whole of said record.

3. Where application is made to this court under section 6 of the said act to require a case to be certified to it for its review and determination, a certified copy of the entire record

of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application.

INTEREST, COSTS, AND FEES.

XXXVIII

The provisions of Rules 23 and 24 of this court, in regard to interest and costs and fees, shall apply to writs of error and appeals and reviews under the provisions of sections 5 and 6 of the said act.

MANDATES.

XXXIX

Mandates shall issue as of course after the expiration of thirty days from the day the judgment or decree is entered, unless the time is enlarged by order of the court, or of a justice thereof when the court is not in session, but during the term.

**OFFICE OF THE CLERK,
SUPREME COURT OF THE UNITED STATES
WASHINGTON, D. C.**

**INSTRUCTIONS AS TO APPLICATIONS FOR WRITS OF CERTIORARI UNDER
ACT OF MARCH 3, 1891.**

The following are the requirements on applications for writs of *certiorari* under the act of March 3, 1891:

Petitions are docketed in this court as

_____, Petitioner, v. _____, Respondent.

Before the petition will be docketed there must be furnished this office:

1. An original petition, with written signature of counsel.
2. A certified copy of the transcript of the record, including all proceedings in the Circuit Court of Appeals.
3. An appearance of counsel for petitioner, signed by a member of the bar of this court.
4. A deposit of \$25 on account of costs.

Before submission of the petition there must be furnished:

1. Proof of service of notice of date fixed for submission and of copies of petition and brief upon counsel for the respondent. About two weeks' notice should be given.

2. Twenty-five printed copies of the petition.

3. Twenty-five printed copies of brief in support of petition, if any such brief is to be filed.

4. At least nine uncertified copies of record, which must contain all the proceedings in the Circuit Court of Appeals. These copies may be made up by using copies of the record as printed for the Circuit Court of Appeals and adding thereto printed copies of the proceedings in that court. If a sufficient number of records thus made up cannot be obtained, making it necessary to reprint the record for use on the hearing of the petition, fifty copies must be printed under my supervision, in order that,

should the petition be granted, there may be a sufficient number for use on the final hearing.

Monday being motion day, some Monday must be fixed upon for the submission of the petition. No oral argument is permitted on such petitions, but they must be called up and submitted in open court by counsel for petitioner, or by some attorney in his behalf.

All papers in the case must be filed not later than the Saturday preceding the Monday fixed for the submission of the Petition.

JAMES H. McKENNEY,
Clerk of the Supreme Court of United States.

ORDER IN REFERENCE TO APPEALS FROM THE COURT OF CLAIMS.

**REGULATIONS PRESCRIBED BY THE SUPREME COURT OF THE UNITED
STATES UNDER WHICH APPEALS MAY BE TAKEN FROM THE
COURT OF CLAIMS TO SAID SUPREME COURT.**

RULE I.

In all cases hereafter decided in the court of claims in which, by the act of congress, such appeals are allowable, they shall be heard in the supreme court upon the following record, and none other:

1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case.

2. A finding by the court of claims of the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them; and a separate statement of the conclusions of law upon said facts, upon which the court founds its judgment or decree. The finding of facts and conclusions of law to be certified to this court as a part of the record.

RULE II.

In all cases in which judgments or decrees have heretofore been rendered, where either party is by law entitled to an appeal, the party desiring it shall make application to the court of claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its rulings, judgment, or decree in the case. The court shall, if the specification of the alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as, in the

judgment of said court, shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule I (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the supreme court.

RULE III.

In all cases an order of allowance of appeal by the court of claims, or the chief justice thereof in vacation, is essential, and the limitation of time for *granting* such appeal shall cease to run from the time an application is made for the allowance of appeal.

RULE IV.

In all cases in which either party is entitled to appeal to the supreme court, the court of claims shall make and file their finding of fact, and their conclusions of law therein, in open court, before or at the time they enter their judgment in the case.

RULE V.

In every such case, each party, at such time before trial and in such form as the court may prescribe, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the finding of facts.

RULE VI.

(OCTOBER TERM, 1882.)

Ordered, That Rule I, in reference to appeals from the court of claims, be, and the same is hereby, made applicable to appeals in all cases heretofore or hereafter decided by that court under the jurisdiction conferred by the act of June 16, 1880, ch. 243, "to provide for the settlement of all outstanding claims against the District of Columbia, and conferring jurisdiction on the court of claims to hear the same, and for other purposes."

Adopted May 7, 1883.

RULES OF THE UNITED STATES CIRCUIT COURTS OF APPEALS.

The original rules of the circuit Court of Appeals are here stated as changed in the different circuits; and where the rule has not been changed, it is printed as the rule in the first circuit only, which indicates that it is in force in all the circuits in which no change is stated.

RULE I—*Name*

The court adopts "United States Circuit Court of Appeals for the First Circuit" as the title of the court.

[In the other circuits the word "First" preceding "circuit" is "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

RULE II—*Seal*

The seal shall contain the words "United States" on the upper part of the outer edge; and the words "Circuit Court of Appeals" on the lower part of the outer edge, running from left to right; and the words "First Circuit" in two lines, in the centre with a dash beneath; as follows: [SEAL.]

[In the other circuits the word "First" preceding "Circuit" and the word "First" on the seal, are "Second," "Third," "Fourth," "Fifth," "Sixth," "Seventh," "Eighth," and "Ninth," respectively.]

RULE III—*Terms and Sessions*

First Circuit—One term of this court shall be held annually at the city of Boston at ten o'clock in the forenoon on the first Tuesday of October. Stated sessions thereof shall be there held at the same hour on the first Tuesday of every month, and may be adjourned to such times and places as the court may from time to time designate. But, unless otherwise ordered, any adjournment shall be held to have been made to the first day of the next stated session.

Second Circuit—One term of this court shall be held annually at the city of New York, on the last Tuesday of October, and

shall be adjourned to such times and places as the court may from time to time designate.

Third Circuit—The terms of this court shall commence and be held on the first Tuesday of March, and the first Tuesday of October, at the city of Philadelphia.

Fourth Circuit—There shall be held in the city of Richmond, Virginia, three regular terms of this court; one on the first Tuesday of February, one on the first Tuesday of May, and one on the first Tuesday of November, in each year.

Fifth Circuit—One term of this court shall be held annually at the city of New Orleans on the third Monday of November, and shall be adjourned to such times and places as the court may from time to time designate.

Sixth Circuit—(1) One term of this court shall be held annually on the Tuesday after the first Monday of October, and adjourned sessions on the Tuesday after the first Monday of each other month in the year except August and September. At the July session no causes will be heard, except upon special order of the court. A printed docket containing all cases docketed and not heard shall be made by the clerk for the October, January, and April sessions.

(2) All sessions of the court shall be held at Cincinnati unless otherwise specially ordered by the court.

(3) The court, on the first day of each session, except the July session, will begin calling the cases for argument in the order in which they stand on the docket, and proceed from day to day during the session in the same way.

(4.) If the parties, or either of them, shall be ready when the case is called, the same will be heard, provided that the time within which to file briefs has expired. But a case may be continued once by agreement of counsel in open court or by stipulation filed in the clerk's office, to any session during the term. Subsequent continuances must be made by the court on motion for cause shown, and engagements of counsel in other courts will not be considered good cause for continuance.

(5) Each day's calendar shall consist of the six cases next in order after the case last submitted on the previous day, but the calendar will not include any case continued or passed by the court on stipulation of counsel before the adjournment of court on the previous day. The calendar for each day shall be exhibited in the clerk's office at the adjournment of court on the previous day. Counsel choosing to rely on the judgment of

the clerk as to the probable time of hearing of any case, otherwise than as shown in the day's calendar above provided for, must do so at their own risk.

(6) Two or more cases involving the same question may, by leave of the court or by its order, be heard together, but they must be argued as one case.

(7) For good cause shown, on motion of either party, the court may advance any cause upon the docket to be heard at any session, even though the time permitted under the rules for the filing of briefs may not have expired at the day set for hearing. Such motion for the advancement of causes will be heard only upon five days' previous notice to opposing counsel.

Seventh Circuit—A term of this court shall be held annually at the city of Chicago on the first Tuesday in October, and continue until the first Tuesday in October of the succeeding year. Every term shall be adjourned to such time and places as the court may from time to time designate. Unless otherwise specially ordered, the court will hold at Chicago three sessions for the hearing of causes during each term, beginning on the first Tuesdays in October and January, respectively, and the second Tuesday in April.

Eighth Circuit—Three terms of this court will be held annually, one at the city of St. Paul on the first Monday of May, one at the city of Denver on the first Monday of September, and one at the city of St. Louis on the first Monday of December. Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma, and the Indian Territory in which transcripts are filed on or before the first day of April, and cases from Colorado, Utah, Wyoming, and New Mexico in which transcripts and stipulations of the parties for their hearing of causes during each term, beginning on or before the first day of April, and those only, will be heard at the succeeding May Term of the court in St. Paul.

Cases from Colorado, Wyoming, Utah, and New Mexico in which transcripts are filed on or before the first day of July, and cases from the remainder of the circuit in which transcripts and stipulations of the parties for their hearing at the September Term in Denver are filed on or before the first day of July, and those only, will be heard at the succeeding September Term in Denver.

Cases from Minnesota, North Dakota, South Dakota, Nebraska, Iowa, Kansas, Missouri, Arkansas, Oklahoma, and the

Indian Territory in which transcripts are filed on or before the first day of October and cases from Colorado, Wyoming, Utah, and New Mexico in which transcripts and stipulations of the parties for their hearing at the December Term in St. Louis are filed on or before the first day of October, and those only, will be heard at the succeeding December Term in St. Louis.

These terms of the court may be adjourned to such times and places as the court may from time to time designate.

Ninth Circuit—One term of this court shall be held annually at the city of San Francisco on the first Monday of October, and shall be adjourned to such times and places as the court may from time to time designate.

RULE IV—*Quorum*

First Circuit—(1) In the absence of a quorum on any day appointed for holding a term, or on any day to which the court is adjourned, any judge who attends shall adjourn the court from day to day; or, if no judge is present, the clerk shall so adjourn; and, in the absence of all the judges and the clerk, the marshal or his deputy shall so adjourn. But the court may, from time to time, as provided in Rule 3, enter orders directing an adjournment, or adjournments, for longer periods than from day to day, or *sine die*.

(2) Any judge attending when less than a quorum is present may make all necessary orders touching any suit, proceeding, or process depending in or returned to the court, preparatory to hearing, trial, or decision thereof.

Ninth Circuit—(1) If, at any term or session, a quorum does not attend on any day appointed for holding it, any judge who does attend may adjourn the court from time to time, or, in the absence of any judge, the clerk may adjourn the court from day to day. If, during a term, after a quorum has assembled, less than that number attend on any day, any judge attending may adjourn the court from day to day until there is a quorum or may adjourn without day.

RULE V—*Clerk*

(1) The clerk's office shall be kept at the place designated in the act creating the court at which a term shall be held annually.

(2) The clerk shall not practice, either as attorney or coun-

seller, in this court or in any other court while he shall continue to be clerk of this court.

(3) He shall, before he enters on the execution of his office, take an oath in the form prescribed by section 782, *Rev. Stats.*, and shall give bond in a sum to be fixed, and with sureties to be approved, by the court, faithfully to discharge the duties of his office and seasonably to record the decrees, judgments, and determinations of the court. A copy of such bond shall be entered on the journal of the court, and the bond shall be deposited for safe-keeping as the court may direct.

(4) He shall not permit any original record or paper to be taken from the court room or from the office, without an order from the court.

Section 1 of this rule in the *Fifth Circuit* provides that the clerk's office shall be kept in the city of New Orleans and in the *Ninth Circuit* that the clerk's office shall be kept in San Francisco, California, and by sec. 3 of this rule in the *Fifth Circuit* it is provided that the bond, instead of being in a sum to be fixed, shall be in the sum of ten thousand dollars (\$10,000) while the words "except as provided in Rule 23" are embraced in sec. 4 of this rule in the *Ninth Circuit*.

In the *Seventh Circuit* sec. 1 of this rule provides that the clerk's office shall be kept in Chicago, and to it is added these words:

(5) All fees collected by the clerk which are not properly taxable as costs in any case, and which are not by law required to be by him deposited in the Treasury of the United States shall constitute a fund to be expended by the clerk, under the direction of the court, in the purchase of law books for the library of the court.

(6) The clerk shall keep an accurate and itemized account of all moneys received by him officially, including costs and fees in cases in the court and fees and moneys collected on any account whatever, and shall deposit the same as received daily to his credit as clerk, and separately from all individual accounts in a national bank designated by the senior judge, and at the end of each month and whenever required by the court or senior judge, shall submit to the senior judge a detailed report showing by items all moneys received and all moneys paid out during the month, and the total balances on hand from each and all sources of receipt; each report shall

be accompanied by a statement, over the signature of the cashier or other officer of the bank in which the deposit is kept, of the amount in the bank to the credit of the clerk at the close of the last day included in the report.

RULE VI—*Marshal and Other Officers*

First Circuit—The marshal shall be in attendance during the sessions of the court with such number of bailiffs, messengers, and other officers as the court may from time to time order.

Second and Third Circuits—(1) Every marshal and deputy marshal shall, before he enters on the duties of his appointment, take an oath in the form prescribed by sec. 782, *Rev. Stats.*, and the marshal shall, before he enters on the duties of his office, give bond in a sum to be fixed, and with sureties to be approved, by the court, for the faithful performance of said duties by himself and his deputies. Said bond shall be filed and recorded in the office of the clerk of the court.

(2) The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order

Fourth, Fifth, Eighth, and Ninth Circuits—The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

Sixth and Seventh Circuits—(1) The crier and bailiffs of the court shall, before they enter on their duties, take an oath in the form prescribed by sec. 782, *Rev. Stats.*

(2) The marshal and crier shall be in attendance during the sessions of the court, with such number of bailiffs and messengers as the court may, from time to time, order.

RULE VII—*Attorneys and Counsellors*

First and Second Circuits—All attorneys and counsellors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States and on subscribing the roll; but no fee shall be charged therefor.

Third Circuit—All attorneys and counsellors admitted to

practice in the supreme court of the United States or in any circuit court of the United States shall become attorneys and counsellors in this court, on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States and on subscribing the roll; but no fee shall be charged therefor, and all attorneys and counsellors of the circuit court of the United States for the third circuit shall be attorneys and counsellors of this court without taking any further oath.

Fourth Circuit—All attorneys and counsellors admitted to practice in the supreme court of the United States or in any circuit court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, subscribing the roll, and on payment of a fee of \$5.00.

Fifth Circuit—All attorneys and counsellors admitted to practice in the supreme court of the United States, or in any circuit court of the United States, upon filing certificate of such admission with the clerk of this court, and upon taking an oath or affirmation in the following form, viz:

“I, ———, do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of this court uprightly and according to law, and that I will support the Constitution of the United States,” (a copy of which shall also be filed with the clerk), shall become attorneys and counsellors of this court; provided, however, that any attorney or counsellor eligible to admission as an attorney and counsellor of this court may be admitted to practice, on motion, in open court, upon taking the oath or affirmation as prescribed, and subscribing the roll. On each admission the clerk will collect ten dollars (\$10.00) to be applied to the purchase of law books for the use of the court and bar.

Sixth Circuit—All attorneys and counsellors permitted to practice in the supreme court of the United States or in any circuit court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation as prescribed by Rule 2 of the supreme court of the United States, and upon subscribing the roll.

The fee for such admission shall be ten dollars (\$10.00) in accordance with the table of fees as prepared by the supreme court of the United States.

Every person taking the oath and paying such fee shall be entitled to a certificate of his admission, signed by the clerk.

Seventh Circuit—All attorneys and counsellors admitted to practice in the supreme court of the United States or in any circuit court of the United States shall become attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, and on subscribing the roll.

Eighth Circuit—All attorneys and counsellors admitted to practice in the supreme court of the United States or in any circuit court of the United States, or in the supreme court of any state in this circuit, may, upon motion of some member of the bar of this court, be admitted as attorneys and counsellors in this court on taking an oath or affirmation in the form prescribed by Rule 2 of the supreme court of the United States, and on subscribing the roll; but no fee shall be charged therefor.

(2) And any attorney and counsellor admitted to practice in the courts of highest original jurisdiction in the states and territories of this circuit, or in the supreme courts of such states and territories, or in the district or circuit courts of the United States for this circuit, will be admitted to practice and enrolled as an attorney and counsellor of this court, upon furnishing to the clerk of this court a certificate of a clerk or judge of any one of the courts named that the applicant is an attorney of any one of said courts, and upon subscribing and forwarding to the clerk the following oath: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsellor of the circuit court of appeals for the eighth circuit, uprightly and according to law; and that I will support the Constitution of the United States. So help me God."

Ninth Circuit—All attorneys admitted to practice in the supreme court of the United States or in any circuit court of the ninth circuit shall be deemed attorneys of the circuit court of appeals for the ninth circuit; but such attorneys, on or before their first appearance in open court in said court shall take an oath or affirmation, in the form prescribed by Rule 2 of the supreme court of the United States and subscribe the roll of attorneys. All other persons who have been admitted to practice in the highest court of any state or territory upon presenting satisfactory evidence of good moral character and fair professional standing, may be admitted to practice in said court

upon taking the oath so prescribed and subscribing the roll of attorneys.¹

RULE VIII—*Practice*

The practice shall be the same as in the supreme court of the United States, as far as the same shall be applicable.

RULE IX—*Process*

All process of this court shall be in the name of the President of the United States, and shall be in like form and tested in the same manner as process of the supreme court.

RULE X—*Bill of Exceptions*

The judges of the circuit and district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court.

In the *Seventh Circuit* the rule contains the following additions:

(2) A bill of exceptions shall contain of the evidence only such a statement as is necessary for the presentation and decision of questions saved for review, and unless there be saved a question which requires the consideration of all the evidence, a bill of exceptions containing all the evidence shall not be allowed.

(3) No document shall be copied more than once in a bill of exceptions or in a transcript of the record of the case, but instead there shall be inserted a reference to the one copy set out. A motion for a new trial and orders and entries relating thereto shall not be set out in the transcript unless required by written præcipe, of which a copy shall also be set out.

(4) The cost of unnecessary matter in the bill of exceptions or transcript or in the printed record shall not be recovered of the appellee or defendant in error, and in its discretion the court will in case of dispute appoint a referee to determine and report what was necessary therein, and will tax the cost of the reference as shall seem just.

RULE XI—*Assignment of Errors*

The plaintiff in error, or appellant, shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors which shall set out separately and particularly each error asserted and intended to be urged. No writ of error or appeal shall be allowed until such assignment of errors shall have been filed. When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, each specification of error shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused, and shall state distinctly the grounds of objection to an instruction given. Such assignment of errors shall form part of the transcript of the record and be printed with it. When this is not done counsel will not be heard, except at the request of the court, and errors not assigned according to this rule will be disregarded, but the court at its option may notice a plain error not assigned.

In the *Seventh Circuit*, the rule contains the following clause:

“When the evidence rejected is oral testimony a written statement of the substance of what the witness was expected to testify shall be filed and brought to the attention of the court before the retirement of the jury.

RULE XII—*Objections to Evidence in the Record*

In all cases of equity or admiralty jurisdiction heard in this court, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, exhibit, or translation found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent.

RULE XIII—*Supersedeas and Cost Bond*

(1) Supersedeas bonds in the circuit and district courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs, if he fails to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just dam-

ages for delay, and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the suit, as in real actions and replevin, and in suits on mortgages, or where the property is in the custody of the marshal under admiralty process, or where the proceeds thereof, or a bond for the value thereof, is in custody of the court, indemnity in all such cases will be required only in an amount sufficient to secure the sum recovered for the use and detention of the property, and the costs of the suit and just damages for delay, and costs and interest on the appeal.

(2) On an appeal from any interlocutory order or decree, the appellant shall, at the time of the allowance thereof, file a bond to the adverse party in such sum as the judge who allowed the appeal shall direct, to answer all costs if he shall fail to sustain his appeal.

In the *Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits* the rule is as in the First Circuit except that the second clause reads:

(2) On all appeals from any interlocutory order or decree granting or continuing an injunction in a circuit or district court, the appellant shall, at the time of the allowance of said appeal, file with the clerk of such circuit or district court a bond to the opposite party in such sum as such court shall direct, to answer all costs if he shall fail to sustain his appeal.

RULE XIV—*Writs of Error, Appeals, Return, and Record*

First Circuit—(1) The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case, under his hand and the seal of the court.

(2) In all cases brought to this court by writ of error or appeal to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

(3) No case will be heard until a complete record, containing in itself and not by reference, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in this court, shall be filed.

(4) Whenever it shall be necessary or proper, in the opinion

of the presiding judge in any circuit or district court that original papers of any kind should be inspected in this court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

(5) All appeals, writs of error, and citations, must be made returnable not exceeding thirty days from the day of signing the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

(6) The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty Rule No. 52 of the supreme court.

The testimony in such record shall embrace the *viva voce* proof in the district court, if the same, or the substance thereof, has been reduced to writing with the approval of its judge. The reasonable costs of so reducing the same to writing may be taxed as a part of the costs of the record, except so far as allowed as costs in the district court.

(7) Further proof in instance causes in admiralty shall include only that which could not with diligence have been had at the trial below, or which was there rejected, or was omitted through misapprehension, provided the evidence be accompanied with a certificate of counsel showing reasonable excuse for the misapprehension. Except by order of the court first obtained, merely cumulative proofs shall not be so taken; but for this purpose the evidence of witnesses who had different duties, interests, or opportunities of observation, will not ordinarily be held cumulative in cases of collision or other maritime tort.

(8) Such further proof may be taken after the appeal is allowed, in the manner provided by law for depositions *de bene esse*, or by any examiner appointed, by any circuit or district judge, or selected by the parties, or upon interrogatories and commissions as provided in Rule 13 of the circuit courts of this circuit, *mutatis mutandis*. It must be taken and filed forthwith after it is obtainable, but it cannot, except by order of the court, be taken or filed within thirty days before any session at which the cause may be heard, nor thereafter until the cause has been postponed to the next term or session.

(9) Objections to further proof shall be filed with the magis-

trate and returned with the evidence. Within seven days after the evidence taken, the party so objecting may file in print a motion to suppress the same, with a copy of the objections and a brief. The other party may within seven days thereafter file in print a counter-statement and brief. The objections and counter-statement, so far as they contain matters of fact *dehors* the record, shall be verified by affidavit. The court will consider the objections in advance of the trial, or in connection therewith, as it may in each case determine and without oral argument, and will order suppressed evidence not rightfully taken. The party taking the evidence so suppressed shall pay the costs arising therefrom, including the printing thereof.

(10) Nothing herein shall exclude applications for leave to take further proof, or objections thereto, in advance of the taking thereof, or objections touching the formalities of taking it; but the latter must be brought to the attention of the court forthwith after the evidence is filed.

Second, Fourth, and Sixth Circuits—(1) The clerk of the court to which any writ of error may be directed shall make a return of the same by transmitting a true copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case under his hand and the seal of the court.

(2) In all cases brought to this court, by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record a copy of the opinion or opinions filed in the case.

(3) No case will be heard until a complete record, containing in itself, and not by reference, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this court, shall be filed.

(4) Whenever it shall be necessary or proper, in the opinion of the presiding judge in any circuit or district court, that original papers of any kind should be inspected in this court, upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting, and return of such original papers as to him may seem proper; and this court will receive and consider such original papers in connection with the transcript of the proceedings.

(5) All appeals, writs of error, and citations must be made returnable not exceeding thirty days from the day of signing.

the citation, whether the return-day fall in vacation or in term time, and be served before the return-day.

(6) The record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty Rule 52 of the supreme court.

In the *Third Circuit* this rule is the same as in the Second Circuit as above given, except that after the word "directed." in the first section is added the words "upon being paid or tendered his fee therefor." In the *Fifth Circuit* it is the same as in the Second as above given, except that section 5 thereof was amended Jan. 12, 1905, by the addition of a clause as follows:

"*Provided, however, that appeals taken from interlocutory decrees under the seventh section of the act entitled 'An Act to Establish Circuit Courts of Appeal and Define and Regulate in Certain Cases the Jurisdiction of the Courts of the United States and for Other Purposes,' approved Mar. 3, 1891, as said seventh section is amended by an act approved Feb. 18, 1895. shall be made returnable not exceeding ten days from the day of taking the same.*"

In the *Seventh Circuit*, the rule as to the first six sections is the same as in the Second Circuit, except that the following words are added to sec. 1:

"The clerk may require of the appellant or plaintiff in error, a written præcipe stating in detail what the transcript shall contain, and when a præcipe is filed shall insert a copy thereof in the transcript."

And to sec. 5, are added these words:

"If a party be non-resident the citation and any other writ or notice necessary in the prosecution of the appeal or writ of error may be served upon such party's counsel or attorney of record, who for such purpose may not be discharged unless another, resident, be designated of record in the case upon whom service may be made."

In this circuit there are but six sections in the rule.

In the *Eighth Circuit*, Rule 14 is the same as in the Second, Fourth, and Sixth Circuits, except that the words "and in cases at law a complete copy of the charge of the court to the jury" are added to Clause 2, and by Clause 5, appeals, writs of error, and citations are made returnable not exceeding sixty days from the day of signing the citation.

In the *Ninth Circuit* the 14th Rule is the same as in the Second Circuit, except that after the word "record" in Clause 1, there is added the words "opinion or opinions of the court," and Clause 2 reads as follows:

(2) "In all cases brought to this court by writ of error or appeal, to review any judgment or decree, the clerk of the court by which such judgment or decree was rendered shall annex to and transmit with the record the original writ of error and citation, or citations issued in the cause, and a certificate under seal, stating the cost of the record and by whom paid."

And sec. 5 reads as follows:

(5) "All appeals, writs of error and citations must be made returnable at San Francisco, California, not exceeding thirty days from the day of signing the citation, whether the return day fall in vacation or in term time, and be served before the return day."

NOTE. In all the Circuits but the *Eighth* writs of error, appeals, and citations are returnable within 30 days from date of signing the citation. In the *Eighth Circuit* the period is 60 days.

RULE XV—*Translations*

Whenever any record transmitted to this court upon a writ of error or appeal shall contain any document, paper, testimony, or other proceeding in a foreign language, and the record does not also contain a translation of such document, paper, testimony, or other proceeding, made under the authority of the inferior court, or admitted to be correct, the record shall not be printed, but the case shall be reported to this court by the clerk, and the court will thereupon remand it back to the inferior court, in order that a translation may be there supplied and inserted in the record.

RULE XVI—*Docketing and Dismissing Cases*

First Circuit—(1) The plaintiff in error or appellant shall docket the case and file the *record* thereof on or before the return day, whether in vacation or in term time. But for good cause shown the justice or judge, who signed the citation, or any judge of this court, may enlarge the time by or before its expiration, the order of enlargement to be filed with the clerk of this court.

(2) If the plaintiff in error or appellant shall fail to comply

with this rule, the defendant in error or appellee may have the cause docketed and *dismissed* upon producing a certificate, whether in term or vacation, from the clerk of the court wherein the judgment or decree was rendered, stating the case and certifying that such writ of error or appeal has been duly sued out or allowed. And in no case shall the plaintiff in error or appellant be entitled to docket the case and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court. But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of this court, and if the case is docketed and a copy of the record filed with the clerk of this court by the plaintiff in error or appellant within the period of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter, the case shall stand for argument in due course.

(3) Upon the filing of the transcript of a *record* brought up by writ of error or appeal, the *appearance* of the counsel for the party docketing the case shall be entered.

In the *Second, Third, Fourth, Seventh, Eighth, and Ninth Circuits* the rule is substantially the same as in the First Circuit, except that in the first section its first sentence reads: "It shall be the duty of the plaintiff in error or appellant to docket the case and file the record thereof with the clerk of this court by or before the return day, whether in vacation or in term time." And in the *Ninth Circuit* the words "at San Francisco, California" are inserted between the words "clerk of this court," and "by or before," and the words "at the term," are used in place of the words "in due course," ending the 2d section.

For the *Fifth Circuit* the rule is as above, except that when amended on June 20, 1895, the words "the justice or judge who signed the citation" in the first clause were omitted and on April 23, 1895, the following clause was added:

(4) "In all cases the plaintiff in error or appellant on docketing a case and filing the record, shall enter into an undertaking with the clerk, with surety to his satisfaction for the payment of his fees, or otherwise satisfy him in that behalf."

For the *Sixth Circuit* the rule is as given in the Second Circuit, except that by amendment of July 6, 1897, there was inserted at the end of the first sentence of the first section and as

a part of it these words: "And at the time of filing the record, the plaintiff in error or appellant shall deposit with the clerk the sum of thirty-five dollars as security for costs except in cases in which the proper showing is made and an order of this court is entered thereon allowing the cause to proceed *in forma pauperis*."

In the *Eighth Circuit* the following note is added at the end of the rule: "Note. A deposit of twenty-five dollars to secure clerk's costs is required before the record in a cause is filed and docketed."

RULE XVII—*Docket and Calendars*

First Circuit—(1) The clerk shall enter and number on the docket all cases consecutively, in their proper chronological order.

(2) He shall print at least twenty days before the first Tuesday of October and of January, and the second Tuesday of April, a calendar of all the pending cases, arranged by districts, in the following order: Maine, New Hampshire, Rhode Island, Massachusetts.

Second, Third, Fifth, and Eighth Circuits—(1) The clerk shall enter upon a docket all cases brought to and pending in the court in their proper chronological order, and shall print a docket containing all pending cases at each term of the court, and such docket shall be called at every term, or adjourned term; and, if a case is called for hearing at two terms successively, and upon the call at the second term neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellants, unless sufficient cause is shown for further postponement.

In the *Third Circuit* the following clause has been added to Rule 17:

In making up the docket for argument for the term cases continued at former terms and all remanents shall be placed at the head of the argument list in the order with respect to each other in which they stood on the docket at the last preceding term.

The *Fourth Circuit* has, in addition to the above, the following section:

(2) All cases, where the record has been printed and copies thereof furnished to the counsel as provided in Rule 23 shall

stand for argument at the term or adjourned term held next after the docketing of the case.

In the *Sixth Circuit* the rule is as given for the Second Circuit, except that the words "term or adjourned term" are changed to read "calendar session as provided in Rules 3 and 37." And the word "term" in the following line is changed to "calendar sessions."

In the *Seventh Circuit* the rule reads as follows:

The clerk shall prepare calendars of causes for the regular terms of this court, to be held on the first Tuesday of October in each year, and for each adjourned session; placing thereon in proper chronological order only cases in which the *record* shall have been printed fully thirty days before such term or session and those causes in which, the record having been printed, briefs upon both sides have been filed seven days before the beginning of the term or session.

For the *Ninth Circuit*, the rule is as follows:

The clerk shall, upon payment to him by the appellant or plaintiff in error of a deposit of twenty-five dollars (\$25.00) in each case, file the record and enter upon a docket all cases brought to and pending in their proper chronological order.

RULE XVIII—*Certiorari*

No certiorari for diminution of the record will be hereafter awarded in any case, unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit. And all motions for such certiorari must be made at the first term of the entry of the case; otherwise, the same will not be granted, unless upon special cause shown to the court, accounting satisfactorily for the delay.

RULE XIX—*Death of a Party*

(1) Whenever, pending a writ of error or appeal in this court, either party shall die, the proper representatives in the personality or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the case shall be heard and determined as in other cases; and, if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record, and thereupon, on motion, obtain

an order that unless such representative shall become parties within sixty days, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed, and, if the party so moving shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the judgment or decree reversed, if it be erroneous: *Provided, however,* that a copy of every such order shall be personally served on said representatives at least thirty days before the expiration of such sixty days.

(2) When the death of a party is suggested, and the representatives of the deceased do not appear within ten days after the expiration of such sixty days, and no measures are taken by the opposite party within that time to compel their appearance, the case shall abate.

(3) When either party to a suit in a circuit or district court of the United States shall desire to prosecute a writ of error or appeal to this court, from any final judgment or decree rendered in the circuit or district court, and at the time of suing out such writ of error or appeal, the other party to the suit shall be dead and have no proper representative within the jurisdiction of the court which rendered such final judgment or decree, so that the suit cannot be revived in that court, but shall have a proper representative in some State or Territory of the United States, or in the District of Columbia, the party desiring such writ of error or appeal may procure the same, and may have proceedings on such judgment or decree superseded or stayed in the same manner as is now allowed by law in other cases, and shall thereupon proceed with such writ of error or appeal as in other cases. And within thirty days after the filing of the record in this court the plaintiff in error or appellant shall make a suggestion to the court, supported by affidavit, that the said party was dead when the writ of error or appeal was taken or sued out, and had no proper representative within the jurisdiction of the court which rendered such judgment or decree, so that the suit could not be revived in that court, and that said party had a proper representative in some State or Territory of the United States, or in the District of Columbia, and stating therein the name and character of such representative, and the State or Territory or District in which such representative resides; and upon such suggestion, he may on motion obtain an order that, unless such representative shall make himself a

party within ninety days, the plaintiff in error or appellant shall be entitled to open the record, and, on hearing, have the judgment or decree reversed if the same be erroneous: *Provided, however,* that a proper citation reciting the substance of such order shall be served upon such representative, either personally or by being left at his residence, at least thirty days before the expiration of such ninety days: *Provided, also,* that in every such case, if the representative of the deceased party does not appear within ten days after the expiration of such ninety days, and the measures above provided to compel the appearance of such representative have not been taken within the time as above required, by the opposite party, the case shall abate: *And provided, also,* that the said representative may at any time before or after said suggestion come in and be made a party to the suit, and thereupon the case shall proceed, and be heard and determined as in other cases.

RULE XX—*Dismissing Cases by Agreement*

Whenever the plaintiff and defendant in a writ of error pending in this court, or the appellant and appellee in an appeal, shall, by their attorneys of record, sign and file with the clerk an agreement in writing directing the case to be dismissed, and specifying the terms on which it is to be dismissed, as to costs, and shall pay to the clerk any fees that may be due to him, it shall be the duty of the clerk to enter the case dismissed, and to give to either party requesting it a copy of the agreement filed; but no mandate or other process shall issue without an order of the court.

RULE XXI—*Motions*

First Circuit—(1) The motion-day shall be the first Tuesday of every stated session of the court, and any other Tuesday while the court shall remain in session.

(2) All motions to the court shall be reduced to writing and shall contain a brief statement of the facts and objects of the motion.

(3) All motions to dismiss writs of error or appeals (except motions to docket and dismiss under Rule 16) or to advance cases, or for writ of certiorari, and other special motions, shall be printed, and be accompanied by printed briefs.

(4) No motion to dismiss, except on special assignment by

the court, shall be heard, unless previous notice has been given to the adverse party or his counsel.

(5) Any motion, of which counsel shall have given notice to the clerk in advance, shall be entered on the clerk's list in the order in which he receives notice thereof, and shall have priority in that order before other motions, unless otherwise specially ordered by the court.

(6) Half an hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court granted before the argument begins.

Second, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits—(1) All motions to the court shall be reduced to writing, and shall contain a brief statement of the facts and objects of the motion.

(2) One hour on each side shall be allowed to the argument of a motion, and no more, without special leave of the court, granted before the argument begins.

(3) No motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

In the *Ninth Circuit* this rule is the same as the above, except that the words "and shall be served upon opposing counsel at least five days before the day noticed for the hearing" are added at the end of the first section thereof. And in the 2d clause one-half hour on each side for argument is prescribed.

RULE XXII—*Call and Order of the Calendar*

First Circuit—(1) On the first Tuesday of October and of January and on the second Tuesday of April the court, except as may from time to time be otherwise ordered, will commence calling cases for argument in the order in which they stand on and calendar and proceed from day to day during the session in the same order, but no case from the District of Massachusetts shall be called before the second Tuesday of the session.

(2) Where no counsel appears and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial the defendant may have the plaintiff called and the writ of error or appeal dismissed.

(3) Where the defendant fails to appear when the case is called for trial the court may proceed to hear an argument on

the part of the plaintiff and to give judgment according to the right of the case.

(4) When a case is reached in the regular call of the calendar and there is no appearance for either party the case may be dismissed at the cost of the plaintiff.

(5) If either of the parties is ready when the case is called the same will be heard; and if neither party shall be ready the case may be dismissed, or be postponed to the next session as the court may order.

(6) If a case is called for hearing at two stated sessions successively, and upon the call at the second session, neither party is prepared to argue it, it will be dismissed at the cost of the plaintiff in error or appellant, unless sufficient cause is shown for further postponement.

(7) The court will not hear arguments on Mondays or Saturdays, unless for special cause it shall so order.

(8) Five cases are liable to be called on the coming in of the court on each day.

(9) Revenue and other cases which concern the United States and which also involve or affect some matter of general public interest, and criminal cases, and cases once adjudicated by this court on their merits and again brought up by writ of error or appeal, may be advanced by leave or order of the court.

(10) Two or more cases involving the same question may, by leave of the court, be heard together, to be argued as one case or more, as the court may order.

(11) No agreement of counsel to pass or postpone a case, or to substitute one case for another, shall become effective except on leave.

Second, Third, Fourth, Fifth and Seventh Circuits—

(1) Where no counsel appears, and no brief has been filed for the plaintiff in error or appellant, when the case is called for trial, the defendant may have the plaintiff called and the writ of error or appeal dismissed.

(2) Where the defendant fails to appear when the case is called for trial, the court may proceed to hear an argument on the part of the plaintiff and to give judgment according to the right of the case.

(3) When a case is reached in the regular call of the docket, and there is no appearance for either party, the case shall be dismissed at the cost of the plaintiff.

In the *Sixth Circuit* this rule is the same as given above, except that a new section has been added as follows:

“(4) All causes shall stand for hearing when the time allowed for printing the records and the briefs of both parties shall have expired: *Provided, however*, that causes may be heard when the records and briefs therein are printed, though the time allowed for printing records and briefs may not have expired.”

In the *Eighth and Ninth Circuits* it is the same as last above, except that the words “in error or appellant” are added at the end of third section.

RULE XXIII—*Printing Records*

First Circuit—(1) In all cases, the plaintiff in error or appellant, on docketing a case and filing the record, shall enter into an undertaking to the clerk, with surety to his satisfaction, for the payment of his fees, or otherwise satisfy him in that behalf.

(2) The clerk shall cause an estimate to be made of the cost of printing the record, and of his fee for preparing it for the printer, and shall notify to the party docketing the case the amount of the estimate. If he shall not pay it within a reasonable time, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when the case is reached at the regular call of the docket, the case may be dismissed.

(3) Upon payment by either party of the amount estimated by the clerk, twenty-five copies of the record shall be printed under the clerk’s supervision, for the use of the court and of counsel.

(4) The clerk shall take to the printer the original transcript on file; but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

(5) The clerk shall supervise the printing, and see that the printed copies are properly indexed; and he shall distribute printed copies to the judges, and the reporter, from time to time, as required, and three copies to the counsel for each party. An additional number of copies may be printed at the request of either party for his own use and at his own expense, or by order of the court.

(6) The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record.

(7) The clerk may receive from either party, and use as parts of the printed record, so far as the same may be of proper and convenient size of type, any portions which have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

(8) If the actual cost of printing the record, together with the fee of the clerk, shall be less than the amount estimated and paid, the amount of the difference shall be refunded by the clerk to the party paying it. If the actual cost and clerk's fee shall exceed the estimate, the excess shall be paid to the clerk before the delivery of a printed copy to either party or his counsel.

(9) In case of reversal, affirmance, or dismissal, with costs, the cost of printing the record and the clerk's fee shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other proper process.

Second Circuit—On the filing of the transcript in every case, the clerk shall forthwith cause fifteen copies of the same to be printed, and shall furnish three copies thereof to each party, at least thirty days before the argument, and shall file nine copies thereof in his office. The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk shall be entitled to demand of the appellant, or plaintiff in error, the cost of printing the record, before ordering the same to be done. If the record shall not have been printed when the case is reached for argument, for failure of a party to advance the costs of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Third Circuit—(1) On the filing of the transcript, the clerk shall forthwith cause twenty copies of the record to be printed, and shall furnish three copies thereof to each party at least six days before the case is called for argument, and shall file four-

teen copies thereof in his office. The parties may stipulate, in writing, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The clerk may demand of the plaintiff in error, or appellant, the costs of printing the record before ordering the same to be done. If the record shall not have been printed when the case is reached in the regular call of the docket, because of the failure of a party to advance the cost of printing, the case may be dismissed. In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

(2) The clerk shall receive from either party and use as parts of the printed record, so far as the same may be of proper and convenient size and type, any portions which may have been printed in any other court, and also printed copies of patents and other exhibits, allowing the party furnishing the same such sum therefor as the clerk deems reasonable to be added to and form a part of the cost of printing.

On Mar. 18, 1895, *ordered* that except upon special allowance by the court or a judge, no cause shall be placed on the docket for argument unless the transcript shall have been filed with the clerk, under Rule 23, at least ten days before the first day of the term.

Fourth Circuit—(1) Hereafter all records shall be printed under the supervision of the clerk, by such printer and at such rate as the court may designate.

(2) Upon the payment of the estimated cost of printing, together with the supervising fees as established by law (which amounts shall be deposited with the clerk within ten days after notice thereof), the clerk shall cause to be printed thirty copies of the record, twenty copies of which shall be filed for the use of the court, three copies furnished to the adverse party, and the remaining copies delivered to the appellant or plaintiff in error at least ten days before the term or adjourned term.

(3) The parties may stipulate in writing that parts only of the record shall be printed, and the case may be heard on the parts so printed, but the court may direct the printing of other parts of the record.

(4) If the record shall not have been printed when the case

is reached in the regular call of the docket, the case may be dismissed.

(5) In case of reversal, affirmance, or dismissal with costs, the amount paid for the printing of the record and the clerk's fees for supervising the same shall be taxed against the party against whom costs are given.

Fifth Circuit—(1) The clerk shall, upon the docketing of a case, forthwith cause an estimate to be made of the cost of printing the record and of his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If he shall not pay it within fifteen days in ordinary cases, and within three days in preference cases, after the date of such notice, the clerk shall notify the adverse party, and he may pay it. If neither party shall pay it, and for want of such payment the record shall not have been printed when a case is reached for hearing, the case may be dismissed at the discretion of the court.

As amended January 12th, 1905.

(2) The clerk shall cause the record in all cases to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to the counsel of each party whose appearance shall have been entered, three copies of the printed record, taking a receipt therefor, and the parties may, by written stipulation filed prior to the printing of the record, agree that only parts of the record shall be printed, and the same may be heard only on the parts so printed, but the court may direct the printing of other parts of the record.

(3) The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

(4) The clerk shall cause at least twenty-five copies of the record to be printed, and may print a larger number on the request of either party on payment of the amount necessary for the printing of such extra copies.

Ordered, that Paragraph 5 of Rule 23, of the standing rules of this court be amended so as to read as follows:

(5) The clerk shall supervise the printing and see that the printed record is properly indexed. There shall be omitted from the printed transcripts the following:

(i) Commissions to take testimony, and the formal captions

to all depositions, and the certificates of commissioners as to the taking of the depositions, except in cases where objections have been made to the depositions on account of defects in caption or certificate.

(ii) All process in the nature of subpoenas, citations, summons, and subpoenas in chancery, unless from the assignment of errors it appears that some issue is raised which makes it necessary for the court to inspect such writs, and then only such as are involved.

In every transcript wherein any pleading, exhibit, or other paper appears at more than one place, such pleading, exhibit, or other paper shall be printed at the place it first appears in said transcript, and not thereafter; but the omission shall be indicated by apt notations and references to the pages of the printed record where it appears.

The clerk shall distribute the printed copies to the judges of the court and to the reporter from time to time, as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the clerk's estimate, the amount of such excess shall be paid to the clerk before he shall deliver or file the printed record or any copies thereof.

Promulgated December 8th, 1905.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same, shall be taxed against the party against whom costs are given, and shall be inserted in the body of the mandate or other process.

(7) The clerk shall receive from either party and use as parts of the printed record so far as the same may be of proper size and type, any portions which may have been printed in any other court, and also printed copies of patents and exhibits, allowing the party furnishing the same such sums therefor as the clerk deems reasonable, to be added to and form a part of the cost of printing.

Sixth Circuit—(1) The clerk shall supervise the printing of all records, and upon the docketing of a case shall forthwith cause an estimate to be made of the cost of printing the record,

and his fee for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error or appellant of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be dismissed upon the motion of the opposite party, or by the court of its own motion.

(2) After the payment to him of such estimate the clerk shall cause at least twenty-five (25) copies of the record to be printed forthwith, shall file the same, and shall furnish to each of the respective parties three (3) copies thereof and take a receipt therefor.

(3) Parties may agree by written stipulation, filed with or prior to the filing of the record, that parts only of the record shall be printed, and the case may be heard on the parts so printed; but the court may direct the printing of other parts of the record. The plaintiff in error or appellant may, within ten days after the case shall be docketed in this court, file with the clerk a statement of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party, within fifteen days after service of such statement, may designate in writing, filed with the clerk, additional parts of the record which he thinks material, and if he shall not be so, he shall be held to have consented to the hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both parties, the clerk shall print those parts only, and the court will consider nothing but those parts of the record. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made which the court shall think proper. If good cause be shown, the time within which the statement of the parts of the record is to be filed with the clerk by either party, as above limited, may be enlarged by the court in session, or by either circuit judge, if eligible to sit in the cause.

(4) If the costs of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the dif-

ference to the party paying the same. If the cost is greater than the estimate, the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver any copies thereof.

(5) In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing and supervision shall be taxed against the party against whom the costs are given, and shall be inserted in the mandate or other proper process.

(6) In any case where the record shall have been printed in the court below either circuit judge may, on the written application of the plaintiff in error or appellant, order that such printed record be used in this court. In such case the judge shall require as a condition of making the order a certificate of the clerk of this court that the record is in accordance with the printed rules and is properly indexed, in which case the supervision fee provided in table of costs, Rule 31, shall be charged and collected by the clerk.

(7) The clerk of this court shall receive proposals for printing which shall be submitted to the senior circuit judge, who may in his discretion award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded. And when a case shall be heard upon a record printed in the court below the cost for printing shall be taxed on the basis of such bid for printing, except when the parties otherwise agree.

Seventh Circuit—(1) In all cases the plaintiff in error or appellant on docketing a case and filing the record shall enter into an undertaking to the clerk with surety to be approved by the clerk for the payment of all costs which shall be incurred in the cause, shall deposit with the clerk twenty-five dollars (\$25.00) to be applied to the payment of costs and fees, and from time to time when necessary shall, on the demand of the clerk, make further deposits for that use.

(2) The clerk, upon the docketing of a case, shall forthwith cause an estimate to be made of the cost of printing the record and of his fees for preparing it for the printer and for supervising the printing thereof, and shall at once notify the attorney for the plaintiff in error, or appellant, of the amount of such estimate, which shall be paid to the clerk within ten days after such notice. If not so paid, the writ of error or appeal may be:

dismissed upon the motion of the opposite party, or by the court of its own motion.

(3) The clerk shall cause the record in each case to be printed forthwith after the payment of such estimate, and shall immediately thereafter furnish to each of the respective parties at least three copies of the printed record, taking a receipt therefor. The parties may, by written stipulation filed with or prior to the filing of the record, agree that only parts of the record shall be printed, and the case will be heard on the parts so printed only, unless the court shall direct the printing of other parts.

(4) The clerk shall cause at least twenty-five copies of the record to be printed and may print a larger number on the request of either party on the payment of the amount necessary for the printing of such extra copies.

(5) The clerk shall supervise the printing and see that the printed record is indexed properly, and in a manner to indicate briefly the character of each document and exhibit referred to. He shall distribute the printed copies to the judges of the court from time to time as required. If the cost of printing the record, together with the clerk's fee for supervising the same, shall be less than the amount estimated and paid, the difference shall be refunded by the clerk to the party paying the same. If the actual cost and the clerk's fee shall exceed the estimate, the amount of the excess shall be paid to the clerk before he shall deliver or file the printed record or copies thereof.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount of the cost of the printing of the record and of the clerk's fee for supervising the same shall be taxed against the party against whom costs are given and shall be inserted in the body of the mandate or other proper process.

(7) Upon the clerk's producing satisfactory evidence by affidavit, or the acknowledgment of the parties or their sureties or attorneys, of having served a copy of the bill of fees, due from them respectively in this court on such parties, their sureties or attorneys, an attachment shall issue against such parties or their sureties respectively, to compel the payment of said fees.

(8) The clerk shall adopt a uniform size for the printing of all records, and the same shall be printed in small pica type, on clear white paper, with a margin of not less than an inch and a half, and show by a note or memorandum the time when each

pleading or document was filed, and the printed record shall also contain running titles of its contents.

(9) The briefs of attorneys shall also be printed and conform as nearly as practicable to the size of the printed record.

(10) The clerk shall, on or before the conclusion of each case, collect and file, or otherwise preserve together, one copy of the printed record and of each brief, printed motion and argument submitted therein.

(11) In any case where the record shall have been printed in the court below, the presiding judge may on the application of the plaintiff in error or appellant order that such printed record may be used in place of the printing hereinbefore provided for. But the clerk shall prepare and cause to be printed and attached to the printed record an index thereof, and shall be paid the same fees for the indexing and supervising of such printed record as if printed under his personal supervision.

(12) The clerk of this court shall obtain sealed proposals for the printing hereinbefore provided for, which proposals shall be submitted to the senior circuit judge of the court, who shall award such printing to the lowest and best bidder, and all such printing shall be done by the person to whom the same is so awarded, except in emergencies, when printing may be done by another at the same or less price and when a case shall be heard upon the record printed below, the costs for printing shall be taxed on the basis of actual cost not exceeding the rate of the accepted bid.

(13) The fees of the clerk of this court shall be the same as those of the clerk of the supreme court for the same services which are at present designated by the supreme court Rule 24.

Eighth Circuit—(1) The plaintiff in error or appellant may, within twenty days after the allowance of any writ of error or appeal, serve on the adverse party a copy of a statement of the parts of the record which he thinks necessary for the consideration of the errors assigned, and file the same, with proof of service thereof, with the clerk of this court; the adverse party, within twenty days thereafter, may designate in writing and file with the clerk additional parts of the record which he thinks material, and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, the clerk shall print those parts

only; and the court will consider nothing but those parts of the record in determining the questions raised by the errors assigned. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error or appeal may be dismissed, or such other order made as the circumstances may appear to the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

(2) On the filing of the transcript in every case the clerk shall cause the same, or the parts thereof designated under this rule, to be printed, and shall furnish three copies of the record so printed to each party at least sixty days before the argument.

(3) In cases brought to this court in which the record has been printed and used upon the hearing in the court below, and which substantially conform to the printed records in this court, the plaintiff in error or appellant upon application to and by leave of this court, may furnish to the clerk twenty-five copies of such record, used on the hearing in the court below, to be used in the preparation of the printed record in this court; and the clerk's fee for preparing the record for the printer, indexing same, supervising the printing and distributing the copies, shall be computed as if said record so furnished had been printed under his supervision.

(4) The clerk shall be entitled to demand of the appellant or plaintiff in error the cost of printing the record before ordering the same to be done.

(5) If the record shall not have been printed when the case is reached for argument, for failure of the party to advance the costs of printing, the case may be dismissed.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record shall be taxed against the party against whom costs are given.

Ninth Circuit—(1) All records shall be printed under the supervision of the clerk, and upon the docketing of a cause he shall cause an estimate to be made of the expense of printing the record, and his fee for preparing it for the printer and supervising the printing, and shall notify the party docketing the case of the amount of the estimate. If the amount so estimated is not promptly paid over to the clerk, and for want of

such payment the record shall not have been printed when a case is reached for argument, the case shall be dismissed.

(2) Upon payment of the amount estimated by the clerk, thirty copies of the record shall be printed under his supervision for the use of the court and of counsel.

(3) In cases of appellate jurisdiction the original transcript on file shall be taken by the clerk to the printer. But the clerk shall cause copies to be made for the printer of such original papers sent up under Rule 14, section 4, as are necessary to be printed; and the whole of the record in cases of original jurisdiction.

(4) The clerk shall supervise the printing and see that the printed copy is properly indexed. He shall distribute the printed copies to the judges and reporter, and one or more printed copies to the counsel for the respective parties.

(5) If the expense of printing and supervision shall be less than the amount estimated and paid, the clerk shall refund the difference to the party paying same. If the expense is greater than the estimate the amount of such excess shall be paid to the clerk before he shall file the printed record or deliver copies to the parties or their counsel.

(6) In case of reversal, affirmance, or dismissal, with costs, the amount paid for printing the record and of the clerk's fee shall be taxed against the party against whom costs are given.

(7) The plaintiff in error or appellant may, upon filing the record in this court, file with the clerk a statement of the errors on which he intends to rely, and of the parts of the record which he thinks necessary for the consideration thereof, and forthwith serve on the adverse party a copy of such statement. The adverse party within ten days thereafter may designate in writing, filed with the clerk, additional parts of the record which he thinks material; and, if he shall not do so, he shall be held to have consented to a hearing on the parts designated by the plaintiff in error or appellant. If parts of the record shall be so designated by one or both of the parties, or if such parts be distinctly designated by stipulation of counsel for the respective parties, the clerk shall print those parts only; and the court will consider nothing but those parts of the record, and the errors so stated. If at the hearing it shall appear that any material part of the record has not been printed, the writ of error

or appeal may be dismissed, or such other order made as the circumstances may appear at the court to require. If the defendant in error or appellee shall have caused unnecessary parts of the record to be printed, such order as to costs may be made as the court shall think proper.

All statements and stipulations filed hereunder shall distinctly and accurately refer to the pages of the original certified record, as well as the documents to be printed or omitted.

(8) At the time of filing the record and docketing the cause, counsel for the plaintiff in error or appellant in patent cases may furnish the clerk with copies of patent office drawings and specifications to be used as inserts, and the same, if in proper form and of convenient size, shall be used in printing the record.

(9) The fee of the clerk for preparing the record for the printer, indexing the same, supervising the printing, and distributing the copies, shall be for each printed page of the record and index, twenty-five cents.

RULE XXIV—*Briefs*

First and Third Circuits—(1) The counsel for the plaintiff in error or appellant, shall file with the clerk of this court, at least six days before the case is called for argument, twenty copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.

(2) This brief shall contain, in order here stated,—

(i) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(ii) A specification of the errors relied upon, which, in cases brought up by writ of error, shall set out separately and particularly each error asserted and intended to be urged; and, in cases brought up by appeal, the specification shall state, as particularly as may be, in what the decree is alleged to be erroneous. When the error alleged is to the admission or to the rejection of evidence, the specification shall quote the full substance of the evidence admitted or rejected. When the error alleged is to the charge of the court, the specification shall set out the part referred to *totidem verbis*, whether it be in instructions given or in instructions refused. When the error alleged is to a ruling upon the report of a master, the specification shall state the exception to the report and the action of the court upon it.

(iii) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof, as may be deemed necessary to the decision of the case shall be printed at length.

(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant, is controverted.

(4) When there is no assignment of errors, as required by sec. 997, *Rev. Stats.*, counsel will not be heard, except at the request of the court; and errors not specified according to this rule will be disregarded; but the court, at its option, may notice a plain error not assigned or specified.

(5) When according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default, he will not be heard, except on consent of his adversary, and by request of the court.

(6) When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but, if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

In the *Second Circuit* this rule is the same, except sec. 1 thereof reads as follows:

“(1) The counsel for the plaintiff in error or appellant shall file with the clerk of this court, at least twenty days before the case is called for argument, ten copies of a printed brief, one of which shall, on application, be furnished to each of the counsel engaged upon the opposite side.”

And section 3 reads as follows:

“(3) The counsel for a defendant in error, or an appellee, shall file with the clerk, at least ten days before the case is called for hearing, ten copies of his printed brief, one of which shall, on application, be furnished to each of the counsel on the opposite side. His brief shall be of a like character with that

required of the plaintiff in error, or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error, or appellant, is controverted.”

In the *Fourth Circuit* the rule is the same as in the First as above given, except that the copies of plaintiff’s brief must be filed, at least ten days before any term or adjourned term, and defendant’s brief must be filed at least three days before the term or adjourned term.

In the *Fifth Circuit* the rule is as in the First, except as to the first and third sections, which are as follows:

(1) The counsel for the plaintiff in error, appellant or petitioner, shall file with the clerk of this court at least fifteen days in ordinary cases, and five days in preference cases, before the case is called for argument, twenty copies of a printed brief, one to be signed in handwriting by an attorney of this court, who has entered an appearance in the case; one copy of the brief shall, on application, be furnished to each of the counsel engaged upon the opposite side.

(3) The counsel for defendant in error, appellee or respondent shall file with the clerk of this court, at least five days before the case is called for argument in ordinary cases and before the case is called for argument in preference cases, twenty copies of a printed brief. His brief shall be of a like character with that required of the plaintiff in error, appellant or petitioner, except that no specification of errors shall be required and no statement of the case, unless that presented by the plaintiff in error, appellant or petitioner is controverted.

In the *Sixth Circuit*, the rule is as follows:

(1) The counsel for the plaintiff in error shall file with the clerk of this court within twenty-five days after the filing of the printed copies of the record, as required in Rule 23, as amended, twenty copies of a printed brief, one of which shall on application be furnished to each of the counsel engaged upon the opposite side.

(2) This brief shall contain, in order here stated:

(i) A concise abstract, or statement of the case, presenting succinctly the questions involved, in the manner in which they are raised.

(ii) A brief of the argument, exhibiting a clear statement of the points of law or fact to be discussed, with a reference to

the pages of the record and the authorities relied upon in support of each point. When a statute of a State is cited, so much thereof as may be deemed necessary to the decision of the case shall be printed at length.

(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, within forty days after the filing of the printed record, as required by Rule 23. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no statement of the case shall be required unless that presented by the plaintiff in error or appellant, is controverted.

(4) When, according to this rule, a plaintiff in error or an appellant is in default, the case may be dismissed on motion; and when a defendant in error or an appellee is in default he will not be heard, except on consent of the adversary, and by request of the court.

(5) When no counsel appears for one of the parties, and no printed brief or argument is filed, only one counsel will be heard for the adverse party; but if a printed brief or argument is filed, the adverse party will be entitled to be heard by two counsel.

In the *Seventh Circuit* the rule is the same as in the First as above given, except that the briefs are required to be filed by the first section thereof within twenty days after the date of the delivery by the clerk of the printed record. And sections 3 and 4 read as follows:

(3) The counsel for the defendant in error or the appellee shall file with the clerk twenty printed copies of his brief within twenty days after the filing of the brief of the plaintiff in error or appellant. His brief shall conform to the requirements of this rule, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted. Either party, at or before the argument of the cause, may file a supplemental brief strictly confined to matter in reply to the brief of the opposite party.

(4) When there is no assignment of errors, as required by sec. 997, *Rev. Stats.*, counsel will not be heard, except at the request of the court, and errors not specified according to this rule, and Rule 11, will be disregarded; but the court at its option may notice a plain error involving the merits of the case,

though not assigned or specified, and though the question be not saved according to the strict rules of practice, if it be apparent of record that the point was contested and not waived in the court below.

In the *Eighth Circuit* the rule is the same as in the First, except that in the first section the words forty days are used instead of six days and section 3 reads as follows:

(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief, at least ten days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of errors shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant, is controverted.

In the *Ninth Circuit* the rule is the same as that in the First, except that the first section reads as follows:

“(1) The counsel for the plaintiff in error or appellant shall file with the clerk of this court, twenty copies of a printed brief, and serve upon counsel for the defendant in error or the appellee one copy thereof, at least ten days before the case is called for argument.”

The third section reads as follows:

“(3) The counsel for a defendant in error or an appellee shall file with the clerk twenty printed copies of his brief and serve upon counsel for plaintiff in error or appellant, one copy thereof, at least three days before the case is called for hearing. His brief shall be of a like character with that required of the plaintiff in error or appellant, except that no specification of error shall be required, and no statement of the case, unless that presented by the plaintiff in error or appellant is controverted.”

RULE XXV—*Oral Arguments*

In the *First, Third, Fourth, Sixth, and Eighth Circuits* the rule is as follows:

(1) The plaintiff in error or appellant in this court shall be entitled to open and conclude the argument of the case. But when there are cross-appeals they shall be argued together as one case, and the plaintiff in the court below shall be entitled to open and conclude the argument.

(2) Only two counsel will be heard for each party on the argument of a case.

(3) Two hours on each side will be allowed for the argument, and no more, without special leave of the court, granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: *Provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

In the *Second Circuit* the third section has been amended to read as follows:

(3) Upon writs of error, appeals in admiralty, appeals from orders granting a preliminary injunction, and in appeals in customs cases, one hour on each side, and in other cases one hour and a half will be allowed. But in all cases where there are no difficult questions of law and the amount involved does not exceed \$500, and in appeals and petitions for review in bankruptcy, only one-half hour on each side will be allowed. No more time than above specified will be allowed without special leave of the court granted before the argument begins. The time thus allowed may be apportioned between the counsel on the same side at their discretion: *Provided, always*, that a fair opening of the case shall be made by the party having the opening and closing arguments.

In the *Fifth Circuit* the third section is as follows:

(3) One hour will be allowed for the plaintiff in error or appellant to open and present his case, and one hour will be allowed to the defendant in error or appellee to answer; thirty minutes will then be allowed to the plaintiff in error or appellant to reply. No more time will be allowed for argument without special leave of the court.

In the *Seventh Circuit* the rule is as in the First Circuit and a fourth section is added as follows:

(4) Reading at length from briefs or reported cases shall not be indulged.

In the *Ninth Circuit* the rule is as in the First Circuit, except that the third section commences with the words "one hour" instead of "two hours."

RULE XXVI—*Form of Printed Records, Arguments, and Briefs*

First and Third Circuits—All records, arguments, and briefs, printed for the use of the court, must be in such form and size

that they can be conveniently bound together so as to make an ordinary octavo volume.

Second Circuit—All arguments and briefs printed for the use of the court must be printed upon a page eleven inches long by seven inches wide and must have a margin of at least two inches in width.

Fourth Circuit—All records, arguments, and briefs, printed for the use of this court, shall be in small pica type, 24 pica "ems" to a line, with an index and a suitable cover containing the title of the court and the cause, the court from which the case is brought into this court, and the number of the case. Size of pages to be nine and a quarter by six and a quarter inches, except that in patent cases the size of the pages shall be ten and three-quarters by seven and five-eighths inches; that is to say, large enough to bind in copies of patent office drawings and speculations without folding. So much of the record as was printed in the court below may be used in this court if they conform to this rule.

Fifth Circuit—All arguments, briefs, motions, and petitions for rehearing printed for the use of the court must be printed on white book paper, size of paper page, trimmed, to be six and a quarter by nine and a quarter inches; size of type page to be four by seven inches, exclusive of folio line; margin to be properly arranged with view of rebinding. Type must not be smaller than long primer.

Sixth Circuit—(1) All records shall be of a uniform size, printed in small pica type, 24 pica "ems" to a line, 48 lines to a page, solid, with an index, and a suitable cover containing the title of the court and cause, the court from which the case is brought to this court, and the number of the case; size of pages to be nine and a quarter by six and a quarter inches, except that in patent cases the size of the pages shall be ten and three-quarters by seven and five-eighths inches; that is to say, large enough to bind in copies of patent office drawings and specifications without folding.

(2) All arguments and briefs of attorneys shall be printed and conform as near as practicable to the size of the printed record.

In the *Seventh Circuit* there is no rule corresponding with Rule 26, as adopted in the other circuits, but Rule 26 is as follows:

Opinions of the Court—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation.

(3) Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records, but, at the end of each term, the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Eighth Circuit—All records, arguments, and briefs for the use of the court must be printed on paper not less than six and one-eighth inches wide by nine and three-eighths inches long, including margin, so that they can be conveniently bound together to make an ordinary octavo volume. Arguments and briefs not conforming to this rule will not be accepted or filed.

Ninth Circuit—(1) All records printed for the use of the court must be printed on unruled white writing paper, nine and a quarter inches long and six and a quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide, excepting in patent cases where counsel furnish to the clerk at the time of docketing the cause, patent office drawings and specifications for insertion. In such cases the margin of the record may be sufficiently enlarged to accommodate such drawings and specifications. The record must be properly indexed. Pica double-leaded is the only mode of composition allowed.

(2) All arguments, briefs, and petitions for rehearing, printed for the use of the court, must be printed on unruled white writing paper, nine and a quarter inches long and six and a quarter inches wide. The printed page, exclusive of any marginal note, reference, or running head, must be seven inches long and four inches wide. Pica double-leaded is the only mode of composition allowed.

RULE XXVII—*Copies of Records and Briefs*

First, Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits—The clerk shall carefully preserve in his office one copy of the printed record in every case submitted to the court for

its consideration, and of all printed motions, briefs, and arguments filed therein.

In the *Fourth Circuit* the rule reads:

The clerk shall cause to be bound two copies of the printed record in every case, and of all printed motions, briefs, and arguments filed therein; one copy to be carefully preserved in his office, and one copy for the use of the court library.

In the *Seventh Circuit* there is no rule corresponding with Rule 27 as adopted in the other circuits, but Rule 27 is as follows:

Rehearing—A petition for rehearing must be filed within thirty days after entry of judgment or decree, or after filing of the opinion, shall be in print, and be served forthwith by copy upon the opposing party, who, within twenty days from such service, may file a printed answer, and the petition shall be determined without oral arguments, unless otherwise ordered. If a petition be not filed within the time allowed, and upon the overruling of a petition, the clerk shall, without special order, issue a mandate to the court below. Twenty copies of such petition or answer shall be filed with the clerk of this court.

RULE XXVIII—*Opinions of the Court*

First, Second, Fifth, and Eighth Circuits—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation.

(3) Opinions printed under the supervision of the judge delivering the same need not be copied by the clerk into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

Fourth Circuit—(1) All opinions delivered by the court shall be printed under the supervision of the judge delivering the same, or of one of the circuit judges, the cost of such printing to be paid by the clerk out of the revenues of his office and charged to the litigants in the respective cases, to be taxed and allowed as other costs.

(2) The original opinions of the court shall be filed with the clerk of this court for preservation.

(3) The clerk of this court shall from time to time cause two sets of the printed opinions of this court to be bound in a substantial manner into volumes, one set to be kept in the clerk's office and one set to be kept in the court library.

Sixth Circuit—(1) All opinions delivered by the court shall, immediately upon the delivery thereof, be handed to the clerk to be recorded.

(2) The opinions of the court shall be printed under the supervision of the clerk by the printer to whom the court printing has been awarded in accordance with paragraph 7, Rule 23.

(3) Opinions printed under the supervision of the clerk need not be copied into a book of records; but at the end of each term the clerk shall cause such printed opinions to be bound in a substantial manner into one or more volumes, and when so bound they shall be deemed to have been recorded within the meaning of this rule.

(4) The cost of printing the opinions shall be defrayed out of the amount received for the same, and any deficit shall be paid out of such fees collected by the clerk as are not properly taxable as costs in any case pending in the court.

In the *Third Circuit* the same, except section 1, which reads as follows:

“(1) All written opinions delivered by the court shall be delivered to the clerk and recorded.” The second section is omitted, and the third section is marked “2.”

Seventh Circuit—This rule is the same as Rule 26 in the First Circuit.

Ninth Circuit—The original opinions of the court shall be filed with the clerk of this court for preservation, and when so filed the same shall be deemed to have been recorded within the meaning of this rule.

RULE XXIX—*Rehearing*

First Circuit—A petition for a rehearing after judgment may be filed at the term at which the judgment is entered, and within one calendar month after such entry, and not later unless by leave granted during the term. It must be in print in the form and style required by Rule 26, and it must briefly and distinctly state its grounds, and be supported by a certificate of counsel. It will not be granted or permitted to be argued, un-

less a judge who concurred in the judgment desires it, and a majority of the court so determines: *Provided*, whenever a judgment is entered within less than a month before the term adjourns, the petition may be filed within a month after the entry of judgment, and with the same effect after the term as though filed before the adjournment.

Second, Third, and Eighth Circuits—A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days, and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel, and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it and a majority of the court so determines.

In the *Fourth Circuit* the following sentence is added to the above: "But such petition shall not operate to stay the mandate or other process provided for in Rule 32, except by special order of the court."

Fifth Circuit—A petition for a rehearing after judgment can be presented only during the term at which judgment is entered, and within twenty days after such entry, unless by special leave granted by the court, and must be printed and briefly and distinctly state its grounds without argument, and be supported by certificate of counsel; and will not be granted or permitted to be argued unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

Sixth Circuit—A petition for rehearing after judgment can be presented only within thirty days after the day when the printed opinion of the court is returned by the printer to the clerk, and can be obtained by counsel for the parties (which date the clerk shall note upon the appearance docket), unless by special leave granted during such thirty days—and must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel; and will not be granted, or permitted to be argued, unless a judge who concurred in the judgment desires it, and a majority of the court so determines.

Ninth Circuit—In cases from the District of Alaska, a petition for rehearing may be presented within thirty days after judg-

ment. In cases from all other districts a petition for rehearing may be presented within fifteen days after judgment. It must be printed, and briefly and distinctly state its grounds, and be supported by certificate of counsel that in his judgment it is well founded, and that it is not interposed for delay. Twenty printed copies must be filed with the clerk of this court.

In the *Seventh Circuit*, Rule 27 corresponds with Rule 29 in the other circuits.

In the *Eighth Circuit* the rule upon the subject is numbered 37.

RULE XXX—Interest

First, Third, and Sixth Circuits—(1) In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below, until the same is paid, at the same rate that similar judgments bear interest in the courts of the State where such judgment was rendered.

(2) In all cases where a writ of error shall delay the proceedings on the judgment of the inferior court, and shall appear to have been sued out merely for delay, damages at a rate not exceeding ten per cent, in addition to interest, shall be awarded upon the amount of the judgment.

(3) The same rule shall be applied to decrees for the payment of money in cases in equity, unless otherwise ordered by this court.

(4) In cases in admiralty, damages and interest may be allowed, if specially directed by the court.

Seventh Circuit—Rule 28 is the same as this rule.

In *Second, Fourth, Fifth, Eighth, and Ninth Circuits* the words "or territory" are added after "state" in the last line of Clause 1.

RULE XXXI—Costs

First Circuit—(1) In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction, costs shall be allowed to the defendant in error or appellee, unless otherwise agreed by the parties.

(2) In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error or appellee, unless otherwise ordered by the court.

(3) In cases of reversal of any judgment or decree in this court, costs shall be allowed to the plaintiff in error or appellant, unless otherwise ordered by the court.

(4) The cost of the transcript of the record from the court below shall be taxable in that court as costs in the case.

(5) Neither of the foregoing sections shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.

(6) When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail.

(7) In all cases certified to the Supreme Court or removed thereto by certiorari or otherwise, the fees of the clerk of this court shall be paid before a transcript of the record shall be transmitted to the Supreme Court.

In the *Second, Third, and Fifth Circuits* the rule is the same, except that Clauses 3 and 4 are numbered Clause 3, and Clauses 5, 6, and 7 become Clauses 4, 5, and 6.

In the *Third and Fourth Circuits* the table of costs is printed as Clause 7.

In the *Sixth Circuit* the same table of costs as promulgated by the Supreme Court, Feb. 28, 1898, is printed at length after Rule 31.

Clause 7, in the *Third, Fourth, and Sixth Circuits*: In pursuance of the Act of Congress of Feb. 19, 1897 (29 *Stats.*, 536, ch. 263) the following table of fees and costs in the Circuit Court of Appeals has been established, to take effect on the first day of March, A. D., 1898:

Docketing a case and filing the record.....	\$ 5.00
Entering an appearance.....	.25
Transferring a case to the printed calendar.....	1.00
Entering a continuance.....	.25
Filing a motion, order, or other paper.....	.25
Entering any rule, or making or copying any record or other paper, for each 100 words.....	.20
Entering a judgment or decree.....	1.00
Every search of the records of the court and certifying the same	1.00
Affixing a certificate and a seal to any paper.....	1.00

Receiving, keeping and paying money, in pursuance of any statute or order of the court, one per cent on the amount so received, kept and paid.	
Preparing the record for the printer, indexing same, supervising the printing, and distributing the copies for each printed page of the record and index.....	.25
Making a manuscript copy of the record, when required by the rules, for each 100 words (but nothing in addition for supervising the printing).....	.20
Issuing a writ of error and accompanying papers, or a mandate or other process.....	5.00
Filing briefs, for each party appearing.....	5.00
Copy of an opinion of the court, certified under seal, for each printed page (but not to exceed \$5.00 in the whole for any copy).....	1.00
Attorney's docket fee.....	20.00

In the *Sixth Circuit* the rule is as in the First, but the sections are numbered from 1 to 6, Clauses 3 and 4 being Clause 3.

In the *Seventh Circuit* the corresponding rule is numbered 29.

In the *Eighth Circuit*, Clause 1 omits the words "except for want of jurisdiction," otherwise the rule is as in the First Circuit, except that Clauses 3 and 4 are Clause 3.

Clause 3, in the *Ninth Circuit*, is as in the First Circuit with the following, "including costs of the transcript from the court below, unless otherwise ordered by the court." Clauses 5, 6, and 7, in the First Circuit, are numbered 4, 5, and 6 in the Ninth.

Clause 7, in the *Ninth Circuit*, is as follows: (7) Upon the clerk's producing satisfactory evidence, by affidavit or the acknowledgment of the parties or their sureties, of having served a copy of any bill of fees due by them, respectively, in this court, on such parties or their sureties, an attachment shall issue against such parties or sureties, respectively, to compel payment of said fees.

RULE XXXII—*Mandate*

First Circuit—In every case finally determined, a mandate or other proper process, in the nature of a *procedendo*, shall be issued to the court below, for the purpose of informing that court of the proceedings in this court, so that further proceedings may be had in the court below, as to law and justice may appertain. Such mandate or other process may issue at any

time on the order of the court; but, unless otherwise ordered, it shall issue as of course after two calendar months from the entry of the judgment, unless a petition for a rehearing has been filed and remains undisposed of.

Second and Third Circuits—In all cases finally determined in this court, a mandate, or other proper process in the nature of a *procedendo*, shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Fourth Circuit—To the above the rule in this circuit adds these words: "Such mandate or other process may issue at any time on the order of the court; but, unless otherwise ordered, it shall issue as of course after the expiration of twenty days from the date of the judgment or decree."

Fifth Circuit—Mandates may issue on application of either of the parties at any time after twenty-one days from the date of the decision, unless the court or one of the judges shall in the meantime grant leave to file a petition for rehearing.

Provided, that in all cases entitled to precedence in this court under section 7 of the Act approved Mar. 3, 1891, the mandate or other proper process may be issued by the clerk after the expiration of seven days from the date of the rendition of the decree of this court, unless otherwise ordered by the court or one of the judges thereof.

Sixth Circuit—In all cases finally determined in this court a mandate or other proper process in the nature of a *procedendo* shall be issued, on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

Such mandate shall not issue until time has elapsed for filing a petition to rehear as defined by Rule 29; and no mandate or other process of *procedendo* shall issue when a petition to rehear is pending, unless specially ordered.

Every mandate shall be accompanied by a copy of the opinion filed in the cause in which it is issued, and the charge for the same shall be taxed in the costs of the case.

Ninth Circuit—In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo*, at the request of counsel for the prevailing party and upon the

payment of any costs due in the case, shall be issued, as of course, from this court to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain. Such mandate, if not stayed by the order of the court, shall be issued in cases from the District of Alaska, on the expiration of thirty days, and in cases from all other districts on the expiration of fifteen days from the date of such final determination, unless within said time a petition for rehearing be filed, in which case the mandate shall not issue until after the determination of such petition.

Seventh Circuit—Rule 30, corresponding with Rule 32 of the other circuits, is the same as Rule 32 of the First Circuit as above given.

Eighth Circuit—In all cases finally determined in this court, a mandate or other proper process in the nature of a *procedendo* shall be issued on the order of this court, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

RULE XXXIII—*Custody of Prisoners on Habeas Corpus*

First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits—(1) Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed.

(2) Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided.

(3) Pending an appeal from the final decision of any court or judge discharging the prisoner he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons, sureties ought not to be required.

In the *Seventh Circuit*, Rule 31 is indicated with Rule 33 as here printed.

In the *Seventh Circuit*, Rule 33 is as follows:

(1) The library of the court shall be under the general supervision and custody of the clerk of the court.

(2) No book shall be removed from the library except by or upon the written order of a Federal judge or the United States district attorney for his own use in Chicago, except that during the sessions of the court any lawyer who has a case upon the docket, upon written application to the clerk and upon the clerk's written order, may take from the library not exceeding three volumes at a time, being responsible for the return thereof within twenty-four hours, and in default of return shall pay to the clerk for the library fund twice the value thereof, but if returned in good condition one dollar for each day's detention beyond the limited time.

(3) Members of the bar of the court may have access to the library at any time during business hours.

RULE XXXIV—*Models, Diagrams, and Exhibits of Material*

First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits—(1) Models, diagrams, and exhibits of material forming part of the evidence taken in the court below, in any case pending in this court, on writ of error or appeal, shall be placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

(2) All models, diagrams, and exhibits of material placed in the custody of the marshal for the inspection of the court on the hearing of a case, must be taken away by the parties within one month after the case is decided. When this is not done, it shall be the duty of the marshal to notify the counsel in the case, by mail or otherwise, of the requirements of this rule; and, if the articles are not removed within a reasonable time after the notice is given, he shall destroy them, or make such other disposition of them as to him may seem best.

In the *Seventh Circuit* the corresponding rule is numbered 32, and is almost identical.

RULE XXXV—*Error in Criminal Cases*

First Circuit—On or after the allowance of a writ of error in a criminal case cognizable by this court, the justice or judge who allowed the writ, or the court which entered the judgment or any judge thereof, shall have the power to admit to bail the plaintiff in error, according to the rules of law applicable to his case.

Second Circuit—(1) An appeal or writ of error from a Circuit

Court or a District Court to this court in the cases provided for in sections 6 and 7 of the act entitled "An Act to establish Circuit Courts of Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved Mar. 3, 1891, and acts to amend said act approved Feb. 18, 1895, and Jan. 20, 1897, may be allowed in term time or vacation by the circuit justice or by any circuit judge within the circuit or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

(2) Where such writ of error to this court is allowed in the case of a conviction of an infamous crime or in any other criminal case in which it will lie, the Circuit Court or District Court, or any justice thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

In the *Third Circuit* there is no rule after Rule 34.

Fourth Circuit—Saturday Consultation-day. The clerk in making his docket shall not set down for argument any cause for any Saturday of the term for which such docket is intended, and this court will meet on said days for consultation only.

Fifth Circuit—Order in Relation to Assignment of Cases for Hearing. Unless otherwise ordered by the senior circuit judge, thirty days prior to the opening of a regular session of this court, the clerk is directed to assign cases for hearing as follows:

At Atlanta, Georgia, four cases per day for the first three days of each week.

At Montgomery, Alabama, four cases per day for the first three days of each week.

At Fort Worth, Texas, four cases per day for the first three days of each week.

At New Orleans, Louisiana, two cases per day for the first three days of each week.

The above assignments shall be made in accordance with existing law regulating the return of appeals, writs of error, and other appellate proceedings in the Fifth Judicial Circuit: *Provided*, that cases entitled by law to preference in hearing and bankruptcy cases shall be first assigned, and cases, whether

preference or not, may, upon stipulation of the parties filed with the clerk and approved by the court, be assigned for hearing at any other place or session of this court designated in such stipulation.

Except as hereinabove provided, the assignment of cases at New Orleans, Louisiana, shall be grouped by States, so as to permit the hearing of cases from one State before the cases from the next State in order shall be called.

Sixth Circuit—Testimony in Admiralty Cases after Appeal. In admiralty appeals no testimony shall be taken except under a commission issued from this court to a clerk of United States court or a United States commissioner by direction of this court, the circuit justice, or either circuit judge qualified to sit on appeal in said case, after cause shown to such court, justice, or judge that such evidence is material and necessary and could not by due diligence have been produced at the original hearing. Such testimony shall be taken only upon interrogatories settled by such court, justice, or judge, upon at least ten days' previous notice to the opposing party or his attorney (accompanied with a copy of the proposed interrogatories) and upon cross-interrogatories to be settled at the same time after five days' previous notice of the same, with copy thereof to be served upon counsel offering testimony.

The *Seventh Circuit* has no Rule 35.

Eighth Circuit—Writs of Error in Criminal Cases. (1) Writs of error to review criminal cases tried in any District or Circuit Court of the United States within this circuit, which may be reviewed under the provisions of the Act of Mar. 3, 1891, creating this court, and the Act of Congress amendatory thereof, approved Jan. 20, 1897, may be allowed in term time or in vacation by the circuit justice assigned to this circuit, or by either of the circuit judges within the circuit, or by any district judge within his district, and the proper security be taken, and the citation signed by him, and he may also grant a supersedeas and stay of execution or proceedings, pending the determination of such writ of error.

(2) Where such writ of error is allowed in the criminal cases aforesaid, the Circuit Court or District Court before which the accused was tried, or the district judge of the district wherein he was tried, within the district, or the circuit justice assigned to the circuit, or either of the circuit judges within the circuit

shall have the power, after the citation has been duly served, to admit the accused to bail in such amount as may be fixed, such bail bond to be, as near as may be, in the form prescribed in the appendix to these rules.

The *Fifth Circuit* gives the above rule as Rule 37.

Ninth Circuit—Assignment of Causes for Hearing. (1) Thirty days prior to the opening of any calendar session of the court, the clerk is directed to assign causes for hearing at the rate of one case for each Monday, and two cases per day for the following four days of each week. Causes shall be grouped by States, and assignments made, so as to permit the hearing of causes from one State before the causes from the next State in order shall be called; causes from the northern district of California shall be assigned for hearing last. Any causes entitled by law to preference in hearing shall be first assigned and take precedence over other causes from the same State.

(2) A stipulation to continue a case to the foot of the calendar or in any way change the day assigned for hearing, will not be recognized as binding upon the court, and no such change will be made except by order of the court for reason shown.

(3) Ten days before each calendar session of the court the clerk shall prepare and cause to be printed a calendar of the causes assigned for the approaching session.

RULE XXXVI—*Petitions in Bankruptcy Cases*

First Circuit—(1) On the filing of a petition for the exercise of the power of superintendence and revision vested in this court by the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, or any acts in addition thereto or amendatory thereof, the clerk shall issue, as of course, an order to show cause, returnable two weeks from the date thereof, which shall be served by copy on each of the adverse parties named in the petition as a person against whom relief is desired, or his solicitor in the proceeding in the District Court, at least one week before the return-day of the order, which service shall be made by the marshal or his deputy in the district where the party or solicitor served resides. •

(2) Within one calendar month after the return-day of the order to show cause, either party may demur, plead, or answer; but the determination of any demurrer, plea, or answer shall be final, and no order to plead over will be allowed; and any party

may secure in his answer all the advantages of a demurrer or plea, or both, by inserting therein the proper allegations therefor. No demurrer shall be general, and no cause of demurrer shall be allowed unless specifically set forth therein.

(3) There shall be no pleadings in reply by the petitioner; but any new matter properly in reply shall be available without the same being pleaded in the petition, or otherwise.

(4) A motion to dismiss may be filed within the time allowed for a demurrer, plea, or answer; or the subject-matter thereof, if it relates to the substance of the proceeding or to the jurisdiction of the court, may be availed of on demurrer, plea, or answer, by proper allegation; and whenever a motion to dismiss is seasonably filed, the time for filing demurrer, plea, or answer, will run from the day on which an order may be entered overruling the motion. Every motion to dismiss shall be filed in print, accompanied with a printed brief; and each of the opposing parties shall forthwith be served by the clerk, through the mail or otherwise, with a copy of the motion and of the brief, and he may file, in print, a brief in reply within two weeks. At the expiration of the time allowed for filing the brief in reply, the motion and briefs will be distributed by the clerk to the circuit judges, and to the district judge, senior in commission, who is not disqualified. Thereupon, the motion will be disposed of by the court on the briefs, unless, at its own suggestion, or for good cause shown, the court shall order oral arguments.

(5) So much of Rule 14 as relates to *viva voce* proofs in the District Courts, or to further proofs in instance causes, in admiralty, shall apply to appeals and petitions authorized by the act aforesaid, or by acts additional thereto or amendatory thereof: *Provided*, that any record on any appeal or petition may be supplemented by any matter agreed to in writing by the parties and filed with the clerk.

(6) The rules with reference to records, printing, and briefs, and all other rules, except as herein modified, shall apply to the proceedings to which this order relates.

(7) Nothing herein shall prevent the court, from time to time, from making for special cause, orders diminishing or enlarging the times named herein, or any other orders suitable to expedite the proceedings or to prevent injustice.

Second Circuit—(1) In all cases the plaintiff in error or appellant on docketing a case and filing a record, shall enter into an

undertaking with the clerk, for the payment of his fees, or otherwise satisfy him in that behalf.

(2) At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs, with proof of service of the same upon the opposing attorneys.

In the *Third Circuit*, there is no Rule 36.

Fourth Circuit—Bankruptcy. Upon the filing of the petition for review as provided for in section 24 (b) of the act to establish a uniform system of bankruptcy throughout the United States, approved July 1, 1898, the clerk of this court shall docket the cause, and shall forthwith serve a certified copy of the petition upon the respondent or respondents, or his or their solicitor, through the mail or otherwise, together with a notice to the respondent or respondents, to answer, demur, or move to dismiss the said petition, within fifteen days from the date of such notice.

(2) The petitioner shall cause a certified transcript of the record and proceedings of the bankruptcy court of the matter to be reviewed to be filed in the clerk's office of this court within thirty days from the date of the filing of the said petition.

(3) Upon the filing of such transcript of the record the clerk of this court shall proceed to cause the record to be printed as provided for in Rule 23 of this court and furnish counsel on both sides with three copies each.

(4) And such causes shall stand for hearing in their regular order. But either side may, upon ten days' notice given to the opposing counsel, have the cause heard, either at term time, or in vacation, or in chambers, upon the briefs, unless at its own suggestion, or for good cause shown, the court shall order oral argument.

(5) That all causes coming up by appeal as provided in section 25 of said Bankruptcy Act shall stand for hearing in this court, either in term or in vacation, and may be called up by either party upon ten days' notice, as provided in section 4 of this rule,

(6) All rules of this court (except as herein modified) shall

apply to the proceedings in bankruptcy to which this rule relates.

(7) Nothing herein shall prevent the court, from time to time, from making, for special cause, orders diminishing or enlarging the times named herein, or any other order suitable to expedite the proceeding or to prevent injustice.

Fifth Circuit—Assignment of Judges. It is ordered that whenever a full bench of three judges shall not be made up by the attendance of the associate justice of the Supreme Court assigned to the circuit, and of the circuit judges, so many of the district judges, in the order of the seniority of their respective commissions and qualified to sit, as may be necessary to make up a full court of three judges, are hereby designated and assigned to sit in this court: *Provided, however,* that the court may at any time, by particular assignment, designate any district judge to sit as aforesaid.

Sixth Circuit—Disposition of Fees not Costs in Cases. All fees collected by the clerk which are not properly taxable as costs in any case pending in the court, and which are not by law required to be deposited by him in the treasury of the United States, after the payment of any deficit arising from the printing of opinions, shall constitute a fund to be expended in the purchase of law books for the library of the court by the clerk, under the direction of the court. And it shall be the duty of the clerk to render to the court, for its examination and approval, a quarterly account of such fees received and disbursed by him.

The *Seventh Circuit* has no Rule 36.

Eighth Circuit—Petitions for Review. (1) A petition for review, under the provisions of section 24 (b) of the bankruptcy law approved July 1, 1898, shall be filed and docketed as an original action in this court and be entitled "*In Re ———, Petitioner,*" and shall specifically designate the person or persons upon whom the petitioner desires notice to be served.

Ninth Circuit—Terms and Sessions of the Court. (1) One term of this court shall be held annually on the first Monday of October, and adjourned sessions on the first Monday of each month in the year. All sessions shall be held at San Francisco, unless otherwise especially ordered by the court.

(2) The October, February, and May sessions shall be known

as calendar sessions, and shall be sessions for the trial of all causes that shall have been placed upon the calendar in pursuance of Rule 35.

(3) A term of this court shall be held annually in the city of Seattle, in the State of Washington, and in the city of Portland, in the State of Oregon. The Seattle term shall be held beginning upon the second Monday in September, and the term at Portland shall be held beginning upon the third Monday in September. All appeals and writs of error from the Circuit and District Courts for the district of Washington, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Seattle, unless it is stipulated by the parties thereto that they be heard in San Francisco. All appeals and writs of error from the Circuit and District Courts for the district of Oregon, the transcripts of which shall be filed in this court between the first day of April and the first day of August of each year, shall be heard at said annual term in the city of Portland, unless it be stipulated by the parties thereto that they be heard in San Francisco. All other appeals and writs of error from said Circuit and District Courts for that district shall be heard at San Francisco, unless it be stipulated by the parties thereto that they be heard at said annual term in the city of Portland. Appeals and writs of error from the Circuit and District Courts for the districts of Idaho and Montana, and from the District Courts of Alaska, may, upon the stipulation of the parties thereto, be heard at the annual term to be held either at Seattle or Portland.

The *First Circuit* has no rule after Rule 36.

RULE XXXVII

Second Circuit—In the preparation of briefs any citations made from "Federal Cases" must be accompanied by the citation of the original report of the case, or, when the case is not elsewhere reported than in the Federal Cases, by a statement to that effect.

The *Fourth Circuit* has no rule after Rule 36.

Fifth Circuit—Rule 37 is entitled "Writs of Error in Criminal Cases," and is the same as Rule 35 of the Eighth Circuit.

The following Form of Appearance Bond on Writ of Error

in Criminal Cases is printed as an appendix to Rule 37 in the Fifth Circuit.

Know all Men by these Presents:

That we, ———, as principal, and ——— as sureties, are held and firmly bound unto the United States of America in the full and just sum of ——— dollars, to be paid to the said United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ——— day of ———, in the year of our Lord one thousand nine hundred and ———.

Whereas, lately at the ——— term, A. D. 190—, of the ——— Court, of the United States for the ——— district of ———, in a suit pending in said court, between the United States of America, plaintiff, and ———, defendant, a judgment and sentence was rendered against the said ———, and the said ——— has obtained a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States Circuit Court of Appeals for the Fifth Circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now the condition of the above obligation is such that if the said ——— shall appear in the United States Circuit Court of Appeals for the Fifth Circuit, on the first day of the next term thereof, to be held at the city of ———, on the first Monday in ———, A. D. 190—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States Circuit Court of Appeals for the Fifth Circuit, in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said ——— Court against him shall be affirmed by the said United States Circuit Court of Appeals for the Fifth Circuit, then the above obligation to be void, else to remain in full force, virtue, and effect.

—————[Seal]

—————[Seal]

—————[Seal]

Approved:

—————,

Judge of the ———.

Sixth Circuit—Appeal or Writ of Error may be Allowed.

(1) An appeal or writ of error from a Circuit Court or a District Court to this court in the cases provided for in section 6 and 7 of the act entitled: "An Act to establish Circuit Courts of

Appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States and for other purposes," approved Mar. 3, 1891, and acts to amend said act, approved Feb. 18, 1895, and Jan. 20, 1897, may be allowed in term time or vacation by the circuit justice, or by either circuit judge within the circuit, or by any district judge within his district, and the proper security be taken and the citation be signed by him, and he may also grant a supersedeas and stay of execution or of proceedings, pending such writ of error or appeal.

(2) Where such writ of error to this court is allowed in the case of a conviction of an infamous crime, or in any other criminal case in which it will lie, the Circuit Court or District Court, or any justice or judge thereof, shall have power, after the citation is served, to admit the accused to bail in such amount as may be fixed.

The *Seventh Circuit* has no rule 37.

Eighth Circuit—Order of Court. (1) Upon the filing of a petition for review, the same shall be presented to the court, or one of the circuit judges, for an order fixing the return-day to the notice required by law.

(2) When such petition is accompanied by a written consent that the petition for review may be filed and a waiver by the defendant or defendants, or their counsel, of such notice, no notice will be issued. In such cases the case will be docketed by the clerk pursuant to Rules 40 and 42.

Ninth Circuit—Photograph of Chinese to be Attached to Bail Bond. Whenever, in cases of deportation of Chinese, the defendant be admitted to bail pending appeal, before the bond be approved and the party released from custody a photograph of defendant shall be attached to said bond.

RULE XXXVIII—*Review of Orders in Bankruptcy*

*Second Circuit—*Petitions to review orders in bankruptcy, filed under the provisions of section 24 (b) of the Bankruptcy Act, must be filed and served within ten days after the entry of the order sought to be reviewed, and a transcript of the record of the proceedings in the bankruptcy court of the matter to be reviewed must be filed and the cause docketed within thirty days thereafter, but the judge of the bankruptcy court may for good cause shown enlarge the time for filing the petition or record, the order of enlargement to be made and filed

with the clerk of this court before the expiration of the times hereby limited for filing the petition and record respectively.

Eighth Circuit—Notice. (1) The notice to be given as provided by law (upon a petition for review) shall be issued by the clerk of this court, under the seal thereof, and shall be addressed to the defendant or defendants, and be served by the marshal of this court, unless an acknowledgment or acceptance of service thereof is made by the defendant or defendants, or their counsel.

Ninth Circuit—No Rule 38.

RULE XXXIX—*Response*

Eighth Circuit—(1) The response to the petition for review, when the defendant elects to make a written response, shall be filed at least fifteen days before the day set for the hearing.

RULE XL—*Printing of Record*

Eighth Circuit—(1) The clerk shall cause the petition and exhibits thereto, if any, and the order, notice, and response, if any, to be printed, and shall distribute the printed copies of same to counsel for the respective parties, as soon as the same are printed.

RULE XLI—*Briefs and Arguments*

Eighth Circuit—(1) Twenty copies of the brief and argument in behalf of petitioner shall be printed and filed ten days before the day set for the hearing, and twenty copies of the brief and argument for the defendant or defendants shall be printed and filed on or before the day of hearing.

RULE XLII—*Hearing*

Eighth Circuit—(1) Petitions for review filed in vacation shall be assigned by the clerk for hearing in their regular order at the next session or term of the court in the same manner as appeals and writs of error in other cases.

(2) Petitions for review filed during a session of the court, when a sufficient showing of urgency is presented, may be set for hearing at that term and upon such terms and conditions as the court may direct.

(3) Petitions for review assigned by the clerk in their regular order as provided in section 1 of this rule, when such as-

signment is for a day near the close of the session, may be advanced by order of the court and set for an earlier day, upon good cause shown therefor by either of the parties.

RULE XLIII—*Costs*

Eighth Circuit—(1) The costs and fees now provided by law in cases upon appeal or writ of error, shall, so far as the same are applicable, be taxed on petitions for review.

(2) Upon the determination of a petition for review such order as to costs will be made as the court may deem necessary.

RULE XLIV—*Procedendo*

Eighth Circuit—(1) In all cases on a petition for review, wherein the action or judgment of the District Court, complained of, is disapproved by this court, the clerk shall, at the expiration of ten days from and after the date of entering judgment in this court, issue process in the nature of a *procedendo* to the said District Court for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such District Court, in conformity with the judgment of this court.

(2) In all cases on petition for review, wherein the action or judgment of the District Court, complained of, is approved or confirmed, or said petition dismissed by this court, the clerk shall forthwith certify that fact to the District Court.

RULE XLV—*Appeals and Writs of Error in Bankruptcy Cases*

Eighth Circuit—(1) The appeals and writs of error provided for by section 25 of the bankruptcy law, approved July 1, 1898, shall be governed by the same rules and regulations as to costs and procedure as are provided by this court for appeals and writs of error in other cases.

GENERAL INDEX.

[References are to sections.]

A.

ABATEMENT—

- of suits, 974–976.
- by death, 976.
- by resignation of officer, 976.
- scire facias* to revive, 974.
- plea in, 1026–1030, 1033.
 - defined, 1030.
 - due order of pleading, 1033.

ACCOUNT—

- common-law action of, 901, 902.
- concurrent jurisdiction in equity, 902.
- See SUITS AT COMMON LAW.

ACTIONS AT COMMON LAW—

- defined, 164, 890–892.
- same as case in law, 164.
- embrace all suits to settle legal rights, 164, 892.
- standard of classification, 890.

ADMIRALTY AND MARITIME JURISDICTION—

- vested exclusively in the federal judiciary, 506–604.
- extent of, a judicial question, 507, 508.
- maritime code of the United States, 510–518.
 - power of congress to legislate on the subject, 510, 511.
 - general maritime law, how far in force, 509–512.
 - limited liability act, 513.
 - Harter act, 514.
 - acts concerning seamen, 515.
 - acts against violation of neutrality, 516.
- law of the high seas, 517, 518.
- two classes of civil cases in admiralty.
- prize causes governed by laws of nations.
 - power of congress to make rules concerning, 521.
- seizure of piratical vessels, 523, 524.
- navigable waters defined, 524–535.
 - not ceded to the federal government, 535.

[References are to sections.]

ADMIRALTY AND MARITIME JURISDICTION (continued)—

criminal jurisdiction in admiralty, 536.

history of federal legislation concerning, 537-540.

maritime contracts, 544.

maritime liens, 541-556.

states may create, 541, 542.

marine torts, 544, 549.

forms of suits in admiralty, 557-559.

jurisdiction of the district courts, 560-604.

contracts, 561.

torts, 562, 563.

liens, 564, 565.

material-men, 566.

seamen's wages, 567, 568.

master's wages, 569.

towage, 570.

pilotage, 571, 572.

salvage, 573, 574.

general average, 675.

marine insurance, 576.

marine hypothecation, 577.

bottomry bonds, 578.

respondentia bonds, 579.

affreightment contracts, 580.

transportation of persons, 580a.

charter-party, 581.

demurrage, 582.

stevedores, 583.

wharfage, 584.

lighterage, 585.

consortship, 586.

petitory and possessory suits, 587.

collisions, 588-592.

destruction of beacon, 593.

sea battery, 594.

marine tort resulting in death, 595-596.

limited liability act, 597.

maritime seizures, 599-600.

restitution of vessels, 601.

prize *jure belli*, 602.

interventions, 604.

venue of suits in admiralty, 590, 600, 603, 604.

common-law remedy, 591.

AFRICAN RACE—

status prior to the late constitutional amendments, 213.

[References are to sections.]

AGREED CASE—

practice allowed in federal courts, 1107.
judgment on reviewed without bill of exceptions, 1107.
federal question raised by, 429.

ALABAMA—

statute of, for improvement of Mobile bay, 48.
constitutional, 48.
venue of suits in federal courts in, 959, note 23.

AMBASSADORS—

power of federal government to appoint and receive, 22.
exemption of, from local jurisdiction, 222-225.
children of born here not citizens, 223-225.

AMENDMENTS—

controlled by federal statutes, 1045.
extent of court's power, 1046.
discretion of court, 1048.
of process, 1047.
of verdict, 1112, 1114.
after reversal by supreme court, 1049.

AMENDMENTS TO FEDERAL CONSTITUTION—

first ten, restraints on federal government, 99, 100, 179.
not restraints on the states, 99, 100, 179.
operation of not enlarged by fourteenth amendment, 99, 100.
late amendments did not change system of government, 189.
nor take away police power of the states, 190-208.

AMOUNT IN DISPUTE—

a jurisdictional fact, when, 728.
rules for determining, 729.
from face of pleading, 730, 731.
upon an issue of fact, 732.
several plaintiffs, 733.
interest, when considered, 734.

ANNUITY—

action of, 903.
obsolete, 903.

APPEAL AND ERROR—

See WRIT OF ERROR.

APPEARANCE OF DEFENDANT—

at common law, 1015.
by attorney, 1015, 1024.
general, 1016-1019, 1022, 1023.
defined, 1017, 1018.
not withdrawn without leave of court, 1019.
special, 1016, 1020-1022.
defined, 1020, 1021.
petition for removal, 1022.

[References are to sections.]

ARTICLES OF CONFEDERATION—

- confederacy under was not a government, 378–380.
- was a league of sovereign states, 378.
- no judiciary, 379–380.
- prize, piracies and boundaries, 379.
- no power to enforce its laws, 380.

ASSIGNEES—

- of choses in action, 718–722.
- bill for specific performance, 719.
- foreign bills of exchange, 721.
- notes of corporations payable to bearer, 720.
- fact of assignment, 722.
- suits by, 718–722.

ASSUMPSIT—

- action of, 904, 905.
- general, 904.
- special, 904.
- great common-law action, 905.

B.

BILLS OF ATTAINDER—

- defined, 103, 104.
- inhibited, 103, 104, 351.

BILLS OF CREDIT—

- defined, 349, 350.
- inhibited, 349, 350.

BILLS OF EXCEPTION—

- defined, 1138.
- practice concerning, 1138–1154.
- admission or rejection of evidence, 1142, 1143.
- charge of the court, 1144–1150.
- settling of, 1152–1154.
- authentication, 1152.
- mandamus to compel, 1153.
- order for time, 1154.
- what to contain, 1149–1151.

BILLS OF EXCHANGE—

- foreign, 721.
- suits on, 721.

BOUNDARY SUITS—

- between states, 411.
- original jurisdiction of supreme court, 411.

[References are to sections.]

BRIDGES—

- across navigable stream, 46, 47.
- authority of states to maintain, 46, 47.
- assent of federal government required, 47.

O.**CALIFORNIA—**

- statute of, concerning ejectment, 870.
- venue of suits in federal courts in, 959, note 23.

CASES IN LAW—

- embrace all suits to settle legal rights, 164, 892.
- same as suits at common law, 164.
- standard of classification, 890.

CERTIORARI—

- writ of, 502-505.
- jurisdiction of supreme court to issue, 502-505.

CHARGE OF THE COURT—

- practice concerning, 1091-1101.
- comment on the evidence, 1091.
- must charge law of the whole case, 1094.
- must submit all issues of fact, 1093.
- state law, 1100.
- supremacy of the federal constitution, 1101.
- peremptory, 1097-1099.
- requested charges, 1095, 1096.
- when and how excepted to, 1140, 1144-1150.

CHOSES IN ACTION—

- assignees of, 718-722.
 - suits by, 718-722.
 - bill for specific performance, 719.
 - notes of corporations, 720.
 - foreign bills of exchange, 722.
 - fact of assignment, 722.

CIRCUIT COURTS—

- jurisdiction of, 653-783.
 - concurrent with the courts of the states, 668-736, 888.
 - under special statutes, 737-783, 889.

CITIZENSHIP—

- defined, 212, 213.
- African race, 213.
- dual citizenship, 234.
- two sources of citizenship, 214.
 - by birth, 215-228.
 - by naturalization, 229-233.

[References are to sections.]

CITIZENSHIP (continued)—

- common-law rules, 215-219.
 - prevailed in the colonies, 215-217.
 - slave population, 213, 217.
 - Indian tribes, 218, 219.
- fourteenth amendment, 220-222.
 - Chinese person, 221.
 - meaning of qualifying words, 222, 228.
- foreign ministers' children, 223-225.
- consuls' children, 224, 225.
- hostile occupation, 226.
- seceded states, 227.
- naturalization, 231-233.
 - collective, 231-233.
 - admission of states, 232.
 - by treaty or statute, 233.
- married women, 230.
- privileges and immunities of, 238-268.
 - of the several states, 238-256.
 - of the United States, 257-268.
 - corporations not entitled to, 252, 268.

COLONIES—

- original thirteen, sovereign states, 16.
- struggle of in regard to judicial procedure, 9.

COMMERCE—

- defined, 36.
- is a unit, 34.
- regulation of, 22-38.
- state action incidentally affecting, 63, 190-203.
 - inspection laws, 53-61.
 - pilotage laws, 33.
 - quarantine laws, 62.
 - exercise of the police power, 190-202.

COMMON LAW—

- principles of, 7-9, 120, 506, 921, 922.
- confirmed in the federal constitution, 120-160, 921, 922.
- the palladium of English liberties, 506.
- the municipal jurisprudence of England, 500.
- is due process of law, 120.
- rules of, regarding citizenship, 212-237.
- constitution construed in light of, 95.

COMPLAINT, DECLARATION OR PETITION—

- must conform to state rules of pleading, 982.
- must state a common-law cause of action, 985, 986.
- requisites of, 981-1013.

[References are to sections.]

CONDEMNATION PROCEEDINGS—

is a common-law action, 640, 641, 920.
mode of procedure, 175.
compensation, 176.

CONFESSIONS—

admissibility of in criminal cases, 129, 130.
test of admissibility, 130.

CONSTITUTION OF THE UNITED STATES—

adoption of by the people of the states, 381.
created a new government, 16-63, 375-397.
rules of construction of, 94-99, 209-211.
 in the light of the common law, 95.
 in the light of contemporaneous history, 96.
 in the light of contemporaneous exposition, 97.
effect of the late amendments, 100, 178-208.
 did not change the system of government, 178-208.
supreme law of the land, 17, 66-69, 376, 1101.
 duty of the courts to maintain, 1101.
establishes distinction between law and equity, 832, 887.
establishes the federal judiciary, 381-386.
established federal procedure, 10, 11.

CONSTITUTIONAL CONSTRUCTION—

method of, 209-211.
 early history, 209.
 modern method, 210, 211.
judicial inclusion and exclusion, 210, 211.
rules of, 95-97.

CONSTITUTIONAL LIMITATIONS—

upon the federal government, 94-197.
 bills of attainder, 103, 104.
 criminal procedure, 101, 102, 110, 132-163.
 due process of law, 111-120.
 eminent domain, 172-176.
 impeachments, 105-110.
 re-examination of facts tried by jury, 169-171, 424.
 self-accusation, 123-131.
 trial by jury, 110, 138, 139, 163-171.
upon the states, 178, 374.
 bills of credit, 349, 350.
 bills of attainder, 351.
 due process of law, 269-298.
 equal protection of the laws, 299-324.
 elective franchise, 325-328.
 obligation of contracts, 329-348.
 ex post facto laws, 351.

[References are to sections.]

CONSTITUTIONAL LIMITATIONS (continued)—

- privileges and immunities of citizens of the states, 238-256.
- privileges and immunities of citizens of the United States,
257-268.
- duties on imports and exports, 352-362.
- tonnage duties, 363-374.
- effect of the late amendments, 100, 178-208.
- did not change scheme of government, 189.

CONTRACT—

- defined, 332-335.
- charters of private corporations, 333.
- construction of legislative grants, 334.
- marriage, 335.
- obligations of defined, 335.
- obligations of, not to be impaired, 329-348, 677-686.
- changing remedy, 337, 338.
- changing statute of limitation, 339.
- judgment for tort, 340.
- withdrawing power of taxation, 341.
- increasing exemptions, 342.
- laws altering terms of contracts, 343-347.
- inhibition prospective only, 348.
- Virginia tax and coupon cases, 677-681.
- municipal ordinances impairing, 686.

CORPORATIONS—

- charters of contracts, when, 333, 334.
- when regarded as citizens, 296, 300, 712-714, 725.
- when not regarded as citizens, 252, 268.
- foreign, citizen of country creating it, 725.
- service of process on, 934, 1008, 1009.

COVENANT—

- action of, 906.

CRIMINAL LAW—

- grand jury, 133.
- felony, 136.
- indictment, 132-137.
 - necessity of, 4, 132-136.
 - exception, 137.
 - cannot be amended, 134.
 - several counts in, 153.
 - sufficiency of, 142.
- infamous crime defined, 135.
- right to trial by jury, 138, 139.
- speedy and public trial, 140.
- confronted with the prosecuting witnesses, 143, 144.

[References are to sections.]

CRIMINAL LAW (continued)—

- compulsory process for witnesses, 145.
- assistance of counsel, 145.
- cruel and unusual punishment, 146, 147.
- twice in jeopardy, 148-154.
 - trial on defective indictment, 149, 150.
 - verdict constitutes the bar, 151.
- self-accusation, 122-131.
- unreasonable search and seizure, 121.
- ex post facto* laws, 155-159.
 - defined, 157.

D.

DAMAGES—

- exemplary, 691, 730, 731
 - element in case arising under constitution, 691.
 - amount in dispute, 730, 731.

DEBT—

- action of, 616, 618, 739, 907.

DECLARATION, COMPLAINT OR PETITION—

- must conform to state pleading, 982.
- must state a common-law cause of action, 985, 986.
- requisites of, 981.

DEFENSES OF DEFENDANT—

- must conform to state pleading, 1034.
 - exception, 1034.
- requisites of, 1025-1041, 1044.

DEMURRER—

- office of, 1028.
- to evidence, 1090.

DEPOSITION—

- admissible, when, 937, 1071, 1072.
- how taken, 1073.
- motion to suppress, 1074.

DISTINCTION BETWEEN LAW AND EQUITY—

- in the federal courts, 163, 164, 506, 831-833, 887, 897, 930-932, 978-980, 999, 1038, 1041, 1044.

DISTINCTION BETWEEN LEGAL AND EQUITABLE REMEDIES—

- separately pursued in federal courts, 163, 164, 506, 881-883, 887, 889, 897, 930-932, 978-980, 999, 1038, 1041, 1044.

DISTRICT COURTS—

- admiralty jurisdiction of, 506-604.
- common law and equity jurisdiction of, 605-652.

[References are to sections.]

DOCUMENTARY EVIDENCE—

- how produced, 938, 1078–1085.
- subpoena duces tecum*, 1084, 1085.
- papers from general land office, 1085.

DUAL SYSTEM OF GOVERNMENT—

- created by the constitution, 16–63.
- attributes of sovereignty divided, 17, 18–22, 179–181.
- classification of powers, according to distribution, 27.

DUE PROCESS OF LAW—

- of the United States, 111–120.
- of the states, 289–298.
 - judicial procedure, 269–280.
 - eminent domain, 281–287.
 - taxation, 288–298.

E.

EJECTMENT—

- action of, 858–883, 916, 917.
- legal title necessary to maintain, 859–862, 868–875.
- equitable title no defense, 876–880.

EMINENT DOMAIN—

- constitutional guaranties, 172–176, 281–286.
- what is a public use, 173.
- whether taking is for public use presents a federal question, 282–286.
- compensation, 176, 284, 285.
- mode of procedure, 175.

EQUAL PROTECTION OF THE LAWS—

- secured by the fourteenth amendment, 299–324.
 - corporations protected by the inhibition, 300, 319.
- classification for purposes of legislation, 301–311.
- taxation and equal protection of the laws, 312–317.
 - classification for purposes of, 317.
- civil rights, 319–324.

EVIDENCE—

- production of, 937, 938, 1070–1085.
- competency of witnesses, 1069.
- depositions, 1071–1074.
- documentary evidence, 938, 1078–1085.
- subpoena, 1070.
 - duces tecum*, 1084, 1085.
- surgical examination, 1075, 1076.
- cross-examination, 1077.

[References are to sections.]

EVIDENCE (continued)—

- introduction of evidence, 1086.
- order of proof, 1086.
- objections to evidence, 1087-1089.
- demurrer to evidence, 1090.
- state rule of evidence control, 1068.

EXCEPTIONS—

- to rulings of the court, 1138-1154.
- when to be made, 1089, 1140, 1144.
- must be specific, 1087, 1088, 1145.
- bills of, 1138-1154.

EXECUTION—

- state laws control, 942, 943, 1127, 1128.
- supplementary, 943.
- run into all districts in the state, 1128.

EX POST FACTO LAWS—

- inhibited, 155-162.
- defined, 157.
- reason for inhibition, 156.
- change in the law of procedure, 158-162.
- acts mitigating punishment, 161-162.
- when accused discharged, 162.

F.

FEDERAL ADMINISTRATION OF STATE LAWS—

- two systems of law administered in federal courts, 64-69.
- great body of law derived from state authority, 70.
- jurisdiction of federal courts to administer state laws, 73.
- local laws binding on federal courts, 74.
 - rules of property, 80.
 - statutes of frauds, 82, 83.
 - statutes of limitations, 81.
 - recording acts, 84.
 - creation of corporations, 85.
- when United States supreme court follows state decisions, 75-93.
 - construing state constitutions and statutes, 75-78.
 - construing state tax laws, 78.
 - will not when federal question involved, 76, 93.
- principles of general law, 86-90.
 - commercial law, 87.
 - insurance, 88.
 - negligence, 86.
 - common law, 89.
 - bonds in aid of railroad construction, 90.

[References are to sections.]

FEDERAL ADMINISTRATION OF STATE LAWS (continued)—
when federal courts will change decision to conform to state decision, 91.
when will not, 93.

FEDERAL GOVERNMENT—
created by the federal constitution, 17, 18, 381, 1002.
one of enumerated, specified and limited powers, 17-37.
implied powers of, 23-26.
deduced from a group of specified powers, 26.
meaning of implication, 24.
national in character, 21, 22.
supremacy of, 17.
does not possess all the attributes of sovereignty, 20.
classification of governmental powers, 27.

FEDERAL JUDICIARY—
judicial power requisite to existence of government, 375-380.
none under articles of confederation, 378-380.
created by the constitution, 381.
limits of defined in constitution, 382, 383.
distribution of judicial power to supreme court, 384.
independence of, 387.
courts constituting the system, 391, 392.
organized, 388-390.
jurisdiction co-extensive with legislative power, 376, 393, 656, 657.
a new political principle, 657.
distinction between judicial power and jurisdiction, 658.
necessary to maintain supremacy of the constitution, 394-397.
relation of to national peace, 398.
relation of to domestic tranquility, 399.
independence of, 387.
relation of, to state judiciary, 402-405.
one system for some purposes, 405.
power to declare state law void, 69.

FEDERAL PROCEDURE IN SUITS AT COMMON LAW—
basis of federal procedure at law, 10-15, 886, 887, 921, 922.
complexity of, 921, 922.
rules derived from common law, 921, 922.
rules derived from federal constitution, 921, 922.
rules derived from federal statutes, 921, 922, 934.
rules derived from state procedure, 921-946, 967-972, 980, 1001, 1042-1044.
constitutional limitations upon, 94-177.
due process of law, 111-120.
eminent domain, 172-175.
jury trial, 163-171.

[References are to sections.]

FEDERAL PROCEDURE IN SUITS AT COMMON LAW (continued)—

- mode of proof, 937, 938, 1071-1073.
- oral examination of witnesses, 1071.
- depositions, 1071-1077.
- production of documents, 1078-1085.
- pleadings, 977-1002, 1025-1044.
 - declaration, complaint or petition, 981-1002.
 - defensive pleadings, 1025-1041.
 - interventions, 1042-1044.
 - state system of pleading, 977-980.
- trial and its incidents, 1050-1137.

FEDERAL QUESTION—

- classification of federal questions, 425, 458.
- when raised, 427, 428.
- how raised, 429-433.
 - degree of certainty required, 430.
 - must be called to attention of the court, 431.
 - certificate of presiding judge, 432.

FELONY—

- defined, 136.

G.

GEORGIA—

- venue of suits in federal courts in, 959, note 23.

GOVERNMENT—

- dual system of created by the constitution, 16-63.
- powers vested in the federal government, 17-39, 179, 180.
- powers reserved to the states, 40-63, 179-208.
- sovereignty divided between the federal and state governments, 17, 179-187.
 - each supreme in its sphere, 17.
- departments of kept separate, 377.

GRAND JURY—

- office and functions of, 133.
- See CRIMINAL LAW.

H.

HABEAS CORPUS—

- writ of, not to be suspended, 177.
- jurisdiction to issue, 467-487.
- what courts and judges may issue, 468.
- when writ may issue, 471-481.
- nature and office of the writ, 470.
- procedure, 482-487.

[References are to sections.]

I.

IDAHO—

venue of suits in federal courts in, 959, note 23.

ILLINOIS—

venue of suits in the federal courts in, 959, note 23.

INDIANA—

venue of suits in the federal courts in, 959, note 23.

INDICTMENT—

necessity of, in prosecutions for infamous crimes, 132-137.

exceptions, 137.

cannot be amended, 134.

several counts in, 153.

acquittal upon defective, 149-151.

INFAMOUS CRIME—

defined, 135, 136.

prosecuted only on presentment or indictment of grand jury, 132.

exception, 137.

INQUIRY—

writ of, 1111.

IOWA—

venue of suits in federal courts in 959, note 23.

INSPECTION LAWS OF THE STATES—

subject matter of, 54, 55.

articles subject to state inspection laws, 55.

object of state inspection laws, 56.

commercial classification of subjects of inspection, 59.

means and method of inspection, 57.

is an exercise of the police power, 60, 61.

in harmony with regulation of commerce, 61.

duties on imports to pay cost of inspection, 53, 58.

INTERSTATE COMMERCE—

regulation of, 29-39, 191-200.

suits to protect, 780.

history of legislation concerning, 780, note 80.

INTERVENTION—

available in federal courts, 1043.

exception, 1044.

unknown at common law, 1042.

J.

JUDGMENTS—

of the circuit courts, 1124-1126.

controlled by state laws, 1124.

lien of, 1125, 1126.

at law reviewed upon writ of error only, 169-171, 1155.

in bankruptcy, 171.

of state courts reviewed upon writ of error only, 421-424.

[References are to sections.]

JUDGES—

federal judges, 929, 939.
 personal administration of not controlled by state laws, 929, 939, 1092.
 duty to submit all issues of fact to the jury, 1093.
 to charge law of the whole case, 1100.
 to charge the state law, 1100.
 not required to submit special issues, 1096.
 province of, and jury, respectively, 1091.

JUDICIAL POWER OF THE UNITED STATES—

vested by the constitution, 381.
 limits of, defined, 382, 383, 656, 657.
 requisite to the existence of the government, 375, 376.
 distinction between, and jurisdiction, 658, 659.
 distribution of to supreme court, 384.
 vested in a system of federal courts, 385.
 co-extensive with the legislative power, 375, 656, 657.

JUDICIAL PROCEDURE—

act of conformity, 921-946, 967-972, 977-980, 1001, 1042-1044.
 federal adoption of state procedure, 921-946, 967-972, 979-980, 1001, 1042-1044.
 when state procedure followed, 946, 967, 977, 1001, 1034, 1043, 1110, 1124.
 when state procedure not followed, 834, 845, 848, 868-871, 930-945, 978-990, 1041, 1044, 1070, 1071.
 common-law principles and rules of procedure, 7, 9, 111-177.
 confirmed in federal constitution, 120, 121, 122, 129, 132, 922.
 importance of just procedure, 5-7.
 a substantive right, 2-4.
 absence of indicates national decay, 5.
 guaranty of civil liberty, 7.
 struggle for in England and Colonies, 6-9, 112, 121, 129.
 judicial murders in England, 6, 7.
 parliamentary murders in England, 103, 109.
 bills of attainder, 103, 104.
 impeachments, 105, 109.
 principles of procedure fixed by federal constitution, 10-15, 94-160, 886, 887.
 bills of attainder, 103, 104.
 due process of law, 111-120.
 impeachments, 105-109.
 indictment necessary in prosecution for infamous crime, 132-137.
 trial by jury, 110, 138, 139, 163, 166; 1054.
 unreasonable searches and seizures, 121-131.

[References are to sections.]

JUDICIAL PROCEDURE (continued)—

- witness, not against self in criminal case, 129, 130.
- compulsory process for, 145.
- confronted by, 143, 144.
- relation between criminal and civil procedure, 5.
- states authorized to establish their own procedure, 265-267, 269-281.
- due process of law of the states, 269, 298.

JURISDICTION OF THE CIRCUIT COURT—

- jurisdiction defined, 659, 660, 661, 662, 663.
- is concurrent or exclusive, 665.
 - meaning of concurrent, 667.
- common-law and equity jurisdiction of, 668-783.
- concurrent with the state courts, 668-736.
 - suits arising under the constitution, laws and treaties of the United States, 668-708.
 - diversity of citizenship, 709-724.
 - foreign states, citizens or subjects, 724, 725.
 - United States plaintiffs, 726.
 - land grants from different states, 727.
- amount in dispute, 728-735.
 - in what cases requisite, 728.
 - rules for determining, 729-734.
- ancillary suits, 735.
- under special statutes, 737-783.
 - by officers of the United States, 737-745.
 - for violation of laws regulating carriage of passengers in merchant vessel, 746.
 - condemnation of property used in aid of insurrection, 747.
 - slave trade laws, 748.
 - assignees of debentures, 749.
 - patent laws, 750-756.
 - copyright laws, 757-760.
 - by United States or officers against national banks, 761.
 - by banks against comptroller, 761.
 - for injuries under the revenue laws, 762.
 - to enforce right to vote, 763.
 - for deprivation of civil rights, 764-766.
 - by and against trustees in bankruptcy, 767.
 - condemnation of private property for public use, 768.
 - under the Tucker act, 769.
 - under laws forbidding importation of foreigners under contract to labor, 770.
 - to prevent unlawful occupancy of public lands, 771.
 - partition, when United States are tenants, 772.
 - seizure and destruction of obscene books, pictures and other articles, 773.

[References are to sections.]

JURISDICTION OF THE CIRCUIT COURT (continued)—

- under acts to protect trade and commerce, 774-781
- to naturalize alien, 782.
- none in original *mandamus* proceeding, 783.

JURISDICTION OF THE CIRCUIT COURT OF APPEALS—

- appellate, defined, 466, 466a.
- time allowed to sue out writ of error or appeal, 466a.

JURISDICTION OF THE DISTRICT COURTS—

- admiralty jurisdiction, 560-604.
- common law and equity jurisdiction, 605-652.
- suits for penalties and forfeitures, 611-614, 620, 623, 624.
- suits by United States or officers, 615-624.
- seizure on land and waters not navigable, 623.
- condemnation of property used in aid of insurrection, 624.
- suits by assignees of debentures, 625.
- suits to redress deprivation of civil rights, 626-628.
- suits by aliens for torts in violation of the laws of nations or treaties, 629.
- suits against consuls and vice-consuls, 631.
- suits under Tucker act, 632-639.
- condemnation of private property for public use, 640-641.
- suits to prevent unlawful occupancy of public lands, 642.
- suits under interstate commerce act, 643-648.
- seizure and destruction of obscene books and pictures, 649.
- suit for penalties under safety appliances act, 650.
- suits transferred from territorial courts, 651.
- issues of fact tried by jury, 652.
- habeas corpus*, 468.

JURISDICTION OF THE SUPREME COURT—

- appellate jurisdiction, 418-465.
 - over circuit and district courts, 459-462.
 - over circuit court of appeals, 463.
 - over court of claims, 464.
 - over the state courts, 418-458.
- original jurisdiction, 406-417.
- special writs, 467-505.
 - habeas corpus*, 467-487.
 - prohibition, 488-493.
 - mandamus*, 494-501.
 - certiorari*, 502-505.

JURORS—

- qualification of, 1055, 1056.
- apportioned to district, 1057.
- mileage and *per diem*, 1059.
- how drawn, 1058.
- summoned, 1060.

[References are to sections.]

JURORS (continued)—

- talesmen, 1061, 1062.
- special jurors, 1063.
- challenges, 1064-1065a.
- impaneling, 1066.

JURY TRIAL—

- secured by federal constitution, 110, 138, 139, 163-171, 1054.
- defined, 139, 165, 1054.
- common-law jury, 139, 165, 1054.
- common-law jury trial, 139, 165, 1054.

K.

KANSAS—

- venue of suits in federal courts in, 959, note 23.

KENTUCKY—

- venue of suits in federal courts in, 959, note 23.

L.

LAND—

- suits to recover, 856-883.
- legal title necessary, 856-883.
- common-law rule, 860-862.
- Lord Mansfield's doctrine, 860-862.
- patents issued by the United States, 863-867.
 - conclusive of legal title, 863.
 - void, collaterally attacked, 867.
 - necessary to convey legal title, 865.
 - exception, 866.
 - swamp land act, 865.
- suit not maintainable on registers and receiver's certificates, 868-871.
 - statute of Arkansas, 868.
 - California, 870.
 - Mississippi, 869.
 - Nebraska, 868.
 - Texas, 871.
- suits for not defeated by equitable defenses, 876-882.

LAW AND JURISPRUDENCE—

- system of administered in federal courts, 64-93.

LAWS OF THE SEVERAL STATES—

- rules of decision in federal courts, 70-93, 1068, 1069, 1075, 1100.
 - except, when, 66, 67, 70-74, 1101.
- federal administration of, 70-93.
- constitutes body of the municipal law, 70.
- local laws only binding on federal courts, 74, 1068, 1069.
 - embrace decisions of the highest courts, 1068.
- power of federal judiciary to declare void, when, 69.

[References are to sections.]

LAWS OF THE UNITED STATES—

supreme law of the land, 66, 67, 70-74, 1101.
power of the federal government to execute, 68, 394-399.
federal and state laws form one composite system, 65.

LAW AND EQUITY—

distinction between in federal courts, 163, 164, 506, 831-883, 887,
897, 930-932, 978-980, 999, 1038, 1041, 1044.

LEGAL AND EQUITABLE REMEDIES—

separately pursued in federal courts, 163, 164, 506, 831-883, 887, 897,
930-932, 978-980, 999, 1038, 1041, 1044.

LIBERTY—

defined, 250.
of contract, 251.

LOUISIANA—

venue of suits in federal courts in, 959, note 23.

M.

MANDAMUS—

writ of, 494-501, 783.
defined, 494.
jurisdiction of supreme court to issue, 494-501.
circuit court has no original jurisdiction to issue except under
interstate commerce act, 643-648, 780-781.
jurisdiction of district courts to issue under interstate com-
merce act, 643-648.

MICHIGAN—

venue of suits in federal courts in, 959, note 23.

MINNESOTA—

venue of suits in federal courts in, 959, note 23.

MISSISSIPPI—

judicial system of, 869.
statute of, allowing suits for lands on registers' and receivers' cer-
tificates, 869.
venue of suits in federal courts in, 959, note 23.

MISSOURI—

venue of suits in federal courts in, 959, note 23.

N.

NATURALIZATION—

individual, 229, 230.
collective, 231-233.
by admission of new states, 231.
admission of Texas, 232.
by treaty or statute, 233.

[References are to sections.]

NAVIGABLE WATERS—

defined, 524-531.

of the state, 534.

sovereignty over, reserved to the states, 41-52.

bridges over, 46.

improvement of, 48.

NEBRASKA—

statute of allowing suits for land on registers' and receivers' certificates, 868.

code of civil procedure, 1035.

venue of suits in federal courts in, 959, note 23.

NONSUIT—

history and nature of, 1137.

in federal courts, equivalent to peremptory instruction, 1137.

NORTH DAKOTA—

venue of suits in federal courts in, 959, note 23.

O.**OBITER DICTUM—**

of Mr. Justice Bradley, 1133.

OHIO—

venue of suits in federal courts in, 959, note 23.

P.**PARTIES—**

parties to suits at common law, 967-976.

controlled by state legislation, 677, 678.

limitations on the rule, 968-972.

controlled by common law, when, 972,

death of parties, 974, 975.

scire facias, 974.

expiration of term of office, 976.

PLEADING—

declaration, complaint or petition, 981-1002.

defendant's pleadings, 1025-1041.

intervention, 1042-1044.

state system of pleading adopted, 977-980.

exceptions, 978-980.

PLEAS—

classification of pleas, 1025-1032.

abatement, 1027-1030.

in bar, 1027-1033.

[References are to sections.]

PLEAS (continued)—

to the jurisdiction, 1026-1037.

due order of pleading, 1033-1037.

equitable defenses not allowed, 978-980, 1038-1041.

POLICE POWER—

defined, 181, 190.

reserved to the states, 40-63, 179-208.

not taken away by the late constitutional amendments, 179-328.

states' power of taxation, 182-188, 288-298, 312-317.

quarantine laws, 62.

inspection laws, 53-61.

pilotage laws, 33.

improvement of harbors, bays and navigable rivers, 48.

Sunday laws, 192.

incidentally affecting interstate commerce, 191, 192.

regulating the use of property affected with a public interest, 193-196, 285, 304-308.

health laws, 197, 199, 310.

limiting hours of labor in unhealthy employments, 197, 310.

regulating slaughter of animals, 264.

roads and bridges, 46, 194.

regulating sale of intoxicating liquors, 261.

regulating carrying of dangerous weapons, 262.

separation of the races on railway trains, 263.

power of the state to maintain its own judicial system and procedure, 204, 208, 265-267, 270-280.

protection of the elective franchise, 207, 259, 325, 326.

protection of fundamental rights, 205, 206, 250, 251.

protection of local commerce and industries, 201, 202.

distinction between commerce and manufacture, 202.

safety of railroad crossings, 196.

cost of police supervision, 200.

abolishing common-law fellow servant rule, 303.

making railroad companies responsible for fire, 304, 305.

prima facie evidence of negligence, 305.

attorneys fees, 305.

classification for purposes of legislation, 301-310.

classification for taxation, 295.

classifying cities for registration, 321.

imposing penalty on railroad company for disseminating Johnson grass seed, 322.

PROHIBITION—

writ of, 488-493.

defined, 488.

jurisdiction of supreme court to issue, 488-493.

[References are to sections.]

PRIVILEGES AND IMMUNITIES OF CITIZENS—

of the several states, 238-256.

of the United States, 258-268.

PROCESS, SERVICE AND RETURN—

federal statutory requisites of process, 1004.

power of federal courts to make rules concerning, 1005.

service of, 1006-1011.

by the marshal, 1006.

on aliens and alien corporations, 1009.

on foreign corporations, 934, 1008.

in local suits, 1010, 1011.

substituted service, 1011.

in personal actions, 1003, 1007.

necessity of service, 1003.

persons privileged from service, 1013.

return of process, 1012.

amendment of process, 1047.

amendment of return, 1012.

original writ at common law, 1003.

must be actual service within the state in personal actions, 1003.

Q.

QUARANTINE LAWS—

power of the states to enact, 62.

R.

REFEREE—

state statute authorizing trial by, not followed in federal court, 1052.

trial by a delusion and a snare, 1052.

RELATIONS OF FEDERAL AND STATE JUDICIARIES—

exclusive jurisdiction of federal courts, 402, 403.

three-fold character of federal jurisdiction, 404.

federal and state courts for some purposes form one system, 405.

REMOVAL OF CAUSES—

controlled by last judiciary act, 784.

only a method of acquiring original jurisdiction, 785-788.

classification of removable cases, 789-791.

two classes under special acts, 792, 828, 829.

defendants only can remove, 794.

none but non-resident defendants, 795.

one exception, 795.

all defendants must join in application, 796, 801.

suits arising under constitution, laws and treaties, 797-801.

[References are to sections.]

REMOVAL OF CAUSES (continued)—

- character of parties, 802-805.
- separable controversy, 807-810.
 - carries entire suit, 810.
- prejudice or local influence, 811-816.
 - none but defendants, 813.
 - not allowed as between defendants, 814.
 - application made to federal court, 815.
- procedure in removal of causes, 817-827.
 - petition and bond, 817.
 - when to be filed, 817.
 - on ground of prejudice or local influence, 823, 824.
 - judicial inquiry into facts, 824.
- remanding cause, 825-827.
- removal of suits against persons denied civil rights, 828.
- removal of suits against revenue officers, 829.

REPLEVIN—

- action of, 915.

RIPARIAN RIGHTS—

- determined by state laws, 44.
- subordinate to power of congress over commerce, 45.

RULES OF PROPERTY—

- state laws constituting, 80, 1100.
 - binding on federal courts, 74, 80.

S.

SCIRE FACIAS—

- action of, 918, 919.

SOVEREIGNTY—

- attributes of divided between the federal and state governments, 17, 180.
- national sovereignty vested in the federal government, 16, 17, 20-22, 180.
- municipal sovereignty reserved to the states, 16, 17, 40-63, 179-208.
 - defined, 181.
- distinction between state and national sovereignty early drawn, 50.
- doctrine of Marshall, Taney and Waite, 180, 181.

SPECIAL CASE—

- defined, 1106.
- practice regarding, 1107.

SPECIAL FINDINGS—

- by the court in trials without a jury, 1050, 1135, 1136.
- requisites of, 1135.
 - spread on the minutes, 1136.

[References are to sections.]

SPECIAL ISSUE—

federal courts not bound to submit, 939.
distinction between, and special verdict, 1105.
are creatures of statute, 939, 1104-1107.

SPECIAL VERDICT—

defined, 1104.
origin of, 1103, 1104.
practice in regard to, 1104-1109.
errors arising out of, reviewed without bill of exceptions, 1141.

STATE LAWS—

rules of decision in federal courts, 70-93, 1068, 1069, 1075, 1100.
except, when, 66, 67.
federal administration of, 70-93.
constitute body of municipal laws, 70.

SUITS AT COMMON LAW—

defined, 164, 890-920.
distinction between and suits in equity, 163, 164, 506, 831-883, 887.
897, 930-932, 978-980, 999, 1038, 1040, 1044.
classification of, 894, 896, 897.
ex contractu or *ex delicto*, 894.
local or transitory, 896, 897, 947.
account, 901, 902.
concurrent jurisdiction in equity, 902.
annuity, 903.
assumpsit, 904, 905.
general, 904.
special, 904.
great common-law action, 905.
condemnation proceedings, 920.
covenant, 906.
debt, 616, 618, 739, 907.
detinue, 908, 909.
ejectment, 856-883, 916, 917.
legal title necessary to maintain, 859-862, 868-875.
equitable title no defense, 876-880.
replevin, 915.
scire facias, 918, 919.
trespass, 910.
trespass on the case, 911-913.
trover, 914.

SUPERSEDEAS—

upon writ of error, 449.
bond, 453.

SUPREME LAW OF THE LAND—

constitution, laws and treaties of the United States, 66, 67.

[References are to sections.]

T.

TAXATION—

- power of the states to tax, 182-188, 288-298, 312-317.
- due process of law in taxation, 288-297.
 - general rule, 290.
 - strict judicial procedure not required, 288.
 - notice, 291.
- local assessments, 292, 293.
- classification for taxation, 295, 296, 317.
- non-resident mortgagee's interest, 294.
- equal protection of the laws in, 312-317.

TAX ON IMPORTS AND EXPORTS—

- the states inhibited from, 352-362.
- imports and exports defined, 353.
- imposts defined, 354.
- inhibition does not apply to interstate shipments, 355.

TONNAGE DUTIES—

- states inhibited from levying, 363-374.
- tonnage defined, 364.
- tonnage tax defined, 365.
- wharfage, 368-373.

TENNESSEE—

- venue of suits in federal courts in, 959, note 23.

TEXAS—

- citizens of, became citizens of the United States upon admission, 232.
 - admitted with her population as it stood, 232.
- land system, 871.
- judicial system, 871.
- statute in regard to suits for land, 871.

TREASON—

- defined, 101, 102.
- evidence required to convict, 101.
- penalty, 102.

TREATIES OF THE UNITED STATES—

- nature of, 67, 707, 708.
- removing disability of alien to take and hold land, 708.
 - affects status of person and not rules of property, 708.
- supreme law of the land, 67.

TRESPASS—

- action of, 910.

TRESPASS ON THE CASE—

- action of, 911-913.

[References are to sections.]

TROVER—

action of, 914.

TRIAL OF SUITS AT COMMON LAW—

two modes for trial of issues of fact, 936, 1050, 1051.

by jury, 1050, 1051.

by court without jury, 1050.

not by referee under state law, 1052.

issue of jurisdiction, 1053.

trial by jury, 1054-1128.

qualification of jurors, 1055, 1056.

how jurors drawn, 1058.

mileage and per diem of jurors, 1059.

writs of venire, *facias*, 1060.

talesmen, 1061, 1062.

special jurors, 1063.

challenges, 1064-1065a.

impaneling jury, 1066.

stating issues of fact to court and jury, 1067.

state rules of evidence control in federal courts, 1060.

witnesses, 1069-1070.

competency controlled by state law, 1069.

subpoenas, 1070.

must testify orally, 937, 1071.

deposition when allowed, 1071, 1072.

mode of taking depositions, 937, 1073.

motion to suppress deposition, 1074.

surgical examination of plaintiff, 1075, 1076.

cross-examination of witnesses, 1070.

production of documentary evidence, 938, 1078-1085.

introduction of evidence, 1086.

objections to evidence, 1087-1089.

demurrer to evidence, 1090.

charge to the jury, 939, 1091-1101.

withdrawal of the jury to deliberate on verdict, 940, 1102.

verdict, 1103-1113.

general or special, 1103-1105.

special case, 1106.

agreed case, 1107.

must find all issues of fact, 1108, 1109.

legal effect of, 1110.

amending verdict, 1112, 1113.

defects cured by, 1114.

motion in arrest of judgment, 1115.

for judgment, *non obstante veredicto*, 1116.

repleader, 1116.

new trial, 944, 1117-1123.

[References are to sections.]

TRIALS OF SUITS AT COMMON LAW (continued)—

judgment, 1124, 1126.
execution, 942, 943, 1127, 1128.
trial by the court without jury, 1129-1136.
 procedure in, 1129, 1130.
 stipulation waiving jury, 1131.
 what questions of law may be raised and reviewed, 1132-1134.
 obiter dictum of Justice Bradley, 1133.
 procedure stated by Justice Miller, 1134.
 requisites of special finding, 1135.
 special finding should be spread on minutes, 1136.
preparing case for review, 945, 1138-1163.

U.

UTAH—

venue of suits in federal courts in, 959, note 23.

V.

VENUE OF SUITS AND COMMON LAW—

local or transitory, 947.
in federal courts, 947-966.
regulated by federal statute, 948.
brought where defendant resides, 949-954, 959-966.
 in the state and district, 949, 950.
when jurisdiction based on diversity of citizenship, 951-953.
against national banks, 953.
against aliens and alien corporations, 954.
local suits, 955-958.
infringement of patents, 961.
to protect commerce, 962.
for damages under federal anti-trust act, 963.
for pecuniary penalties and forfeitures, 964.
for internal revenue taxes, 965.
by national banks against comptroller of currency, 966.

VERDICT—

general or special, 1103.
special verdict defined, 1104.
 practice in regard to, 1104, 1105.
special case, 1107.
agreed case, 1107.
must find all the issues of fact, 1108, 1109.
legal effect of, determined by state law, 1110.

[References are to sections.]

VERDICT (continued)—

- special finding by the court, 1135, 1136.
- requisites of, 1135.
- spread upon the record, 1136.

VIRGINIA—

- tax and coupon cases, 679-681, 688-691.

W.

WASHINGTON—

- venue of suits in federal court in, 959, note 23.

WHARFAGE—

- what is, 368-373.
- reasonableness of a question of law and fact, 372.
- determined by local law, 373.

WITNESSES—

- competency, 1069.
- controlled by state law, 1069.
- subpoena for, 1070.

WRIT OF ERROR—

- defined by the common law, 422, 423.
- no re-examination of facts upon, 424.
- lies to review final judgments only, 437, 438.
- to what court it should run, 439-441.
- the foundation of the appellate jurisdiction, 442.
- when and by what judges allowed, 443, 1157.
- what clerks authorized to issue, 444, 1158.
- form and requisites, 445.
- may be amended, 448.
- service and return, 446, 447, 1159, 1160.
- within what time sued out, 454, 1162.
- not the commencement of a new suit, 423.
- when clerk of state court refuses to make return, 1160.
- parties to writs of error, 455-457.
- bond, 453.
- supersedeas*, 449.
- citation in error, 450-452, 1161.
- service and return, 451, 452, 1161.

ANALYTICAL INDEX TO CONSTITUTION OF UNITED STATES—APPENDIX I.

[In this index the abbreviation *am.* stands for amendment.]

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Abridgment of right to vote abridges representation... <i>am.</i>	14	2	
Absent, senate to choose president <i>pro tem</i> , when vice-			
president is	1	3	5
members, congress may compel attendance of.....	1	5	1
Accept, what may not be accepted, etc., by United States			
officers from foreign states, etc.....	1	9	8
Account of receipts and expenditures to be published....	1	9	7
Act as president, congress to declare who shall, in vacancy	2	1	5
Acts, each state to give faith and credit to acts, etc., of			
other states.. ..	4	1	
Adjourn, how congress shall, from day to day	1	5	1
with consent	1	5	4
Adjournment of congress, its effect on the president's veto	1	7	2
questions of, excepted from president's concurrence ..	1	7	3
when congress disagree on, the president to adjourn it	2	3	
Admiralty jurisdiction, judicial power to extend to.....	3	2	1
Admitted, new states may be, by congress	4	3	1
Adoption of constitution not to affect validity of debts, etc.	6		1
Advice and consent of senate, when president must have..	2	2	2
Affirmation. (See OATH.)			
Age for representative in congress twenty-five years.....	1	2	2
senator in congress thirty years	1	3	3
president thirty-five years	2	1	4
vice-president thirty-five years <i>am.</i>	12		3
Agreement, states not to make, without consent of con-			
gress	1	10	3
Aid given to United States enemies disqualifies <i>am.</i>	14	3	
Aliens not eligible as president or vice-president	2	1	4
Aliens not eligible as president or vice-president	12		3
Alliance, no state shall enter into	1	10	1
Ambassadors, how nominated and appointed	2	2	2
president shall receive	2	3	
judicial power to extend to cases affecting.....	3	2	1
in cases affecting, supreme court has original juris-			
diction	3	2	2

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Amendment, XII., congress can enforce	13	2	
XIV., congress can enforce.....	14	5	
XV., congress can enforce.....	15	2	
Amendments in revenue bills, senate may make.....	1	7	1
to constitution, how proposed and ratified.....	5		
Appellate jurisdiction, supreme court shall have, as to law and fact.....	3	2	2
Appoint electors, each state shall.....	2	1	2
Appointed to office, when senator or representative may not be.....	1	6	2
electors, senators, and office-holders not to be.....	2	1	2
Appointment of militia officers reserved to the states.....	1	8	16
senators temporarily by executives of states.....	1	3	2
Appointments by president, what and how made.....	2	2	2
Appropriation for army not to be for more than two years	1	8	12
no money to be drawn from treasury without legal....	1	9	7
Approval by president of bills. (See LAW.)			
required to orders, resolutions, etc., of congress.....	1	7	3
Armies, congress can raise and support.....	1	8	12
Arms, right to bear, not to be infringed.....am.	2		
Army, congress can make rules, etc., for.....	1	8	14
president commander-in-chief of.....	2	2	1
Arrest, when representatives and senators free from.....	1	6	1
Arsenals, congress to exercise exclusive jurisdiction over..	1	8	17
Article, congress has power to enforce. (See AMENDMENTS.)			
Arts, congress to have power to promote.....	1	8	8
Assemble, when congress to.....	1	4	2
right of people to, not to be abridged.....am.	1		
Attainder, no bill of, to be passed.....	1	9	3
no state to pass any bill of.....	1	10	1
of treason, not to work corruption of blood.....	3	3	2
Attendance of absent members in congress may be com- pelled	1	5	1
members of congress privileged from arrest during...	1	6	1
Authors, exclusive rights of.....	1	8	8
Ballot, electors to vote by, for president and vice-presi- dent	12		1
house of representatives to choose president by, when am.	12		1
Bankruptcy, congress to establish uniform laws on.....	1	8	4
Basis of representation, when reduced.....am.	13	2	
Bill of attainder not to be passed.....	1	9	3
how passed, approved, objected to, or passed over ob- jection	1	7	2
revenue to originate in house, but may be altered in senate	1	7	1
Bills of credit, states shall not emit.....	1	10	1

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Blood, attainder of treason not to work corruption of.....	3	3	2
Borrow money, power of congress to.....	1	8	2
Bound to service, persons included in enumerations for representation	1	2	3
Bounties, payment of debt for, not to be questioned...am.	14	4	
Breach of peace, a senator or representative may be ar- rested for a.....	1	6	1
Bribery, civil officers convicted of, to be removed.....	2	4	1
Buildings, congress has exclusive legislation for needful..	1	8	17
Business, a majority of each house a quorum to do.....	1	5	1
Capital crime, how persons held to answer.....am.	5		
Capitation tax, to be laid only in proportion to census....	1	9	4
what amendments shall not affect provisions for.....	5		
Captures, congress to make rules concerning.....	1	8	11
Cases to which judicial power shall extend.....	3	2	1
Cause, no warrant shall issue except upon probable....am.	4		
Census, when to be taken.....	1	2	3
capitation tax to be laid only in proportion to.....	1	9	4
what amendments not to affect provision for.....	5		
Chief justice to preside when president tried for impeach- ment	1	3	6
Chosen, how president and vice-president. (See ELECTED.)	12		1
Citizen of United States, who is.....am.	14	1	
to be a senator must have been nine years a.....	1	3	3
only, is eligible for president.....	2	1	5
Citizens, the judicial power as it respects.....	3	2	1
of each state entitled to privileges of several states...	4	2	1
suits against United States judicial power not to ex- tend to, when.....am.	11		
their rights, privileges, etc., not to be abridged....am.	14	1	
their representation. (See REPRESENTATION.).....am.	14	2	
right of, to vote not abridged on account of color, etc. am.	15	1	
Civil officers shall be removed on conviction of treason, etc.	2	4	
Claim, fugitives held to service to be delivered upon....	4	2	3
Claims for loss or emancipation of slaves not to be paid am.	14	4	
insurrectionary, declared illegal.....am.	14	4	
of a state or of United States not to be prejudiced by construction	4	3	2
Clear, vessels from one state not obliged to, at another...	1	9	6
Coin money, congress has power to.....	1	8	5
no state shall	1	10	1
(See COUNTERFEITING.).....	1	8	6
Coin, no state shall make anything but, a tender in pay- ment	1	10	1
Collect duties, congress has power to lay and.....	1	8	1

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Color, right to vote not to be abridged on account of..am.	15	1	
Comfort given to enemies of United States disqualifies, am.	14	3	
Commander-in-chief, president to be.....	2	2	1
Commerce, congress has power to regulate.....	1	8	3
no preference in, to be given to one state over another	1	9	6
Commissions to fill vacancies, president can grant.....	2	2	3
of United States officers to come from president.....	2	3	1
Common defense, congress empowered to provide for.....	1	8	1
lawsuits, trial by jury at, and, law rules preserved, am.	7		
Compact, states not to make, with each other or with for-			
eign powers.....	1	10	3
Compensation, senators and representatives to receive....	1	6	1
of president not to be altered.....	2	1	6
Compensation, of judges not to be altered.....	3	1	
private property not taken for public use without, am.	5		
Compulsory process, accused to have, for obtaining wit-			
nessesam.	6		
Concur in amendments, senate may, in revenue bills.....	1	7	1
Concurrence of two-thirds necessary for impeachment con-			
victionam.	1	3	6
Confederation, no state shall enter into any.....	1	10	1
debts contracted under the, to be valid.....	6		1
Confession in open court, persons convicted for treason			
onam.	3	3	1
Confronted, accused persons to be, by witnesses.....	6		
Congress, United States legislative powers vested in.....	1	1	
to consist of senate and house of representatives.....	1	1	
members of. (See SENATORS, REPRESENTATIVES.)			
shall direct how census shall be taken.....	1	2	3
number of members of.....	1	2	3
election for, powers of legislature and congress in.....	1	4	1
when it shall assemble.....	1	4	2
powers of to judge of elections, adjourn, etc.....	1	5	1
determine rules, and punish, etc., members.....	1	5	2
each house to keep and publish journal.....	1	5	3
adjournments of, how regulated.....	1	5	4
revenue bills, how acted upon.....	1	7	1
bills passed by, to go to president for approval, etc..	1	7	2
how bills returned to, to be reconsidered.....	1	7	2
what resolutions, etc., of, go to president, etc.....	1	7	3
power of, to lay and collect taxes, etc.....	1	8	1
to borrow money.....	1	8	2
to regulate commerce.....	1	8	3
to establish naturalization and bankruptcy laws.....	1	8	4
to coin money and fix standard of weights and meas-			
uresam.	1	8	5

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Congress to provide for punishment of counterfeiting....	1	8	6
to establish post-offices and roads.....	1	8	7
to promote art and science, and how.....	1	8	8
to constitute inferior tribunals.....	1	8	9
to punish piracy and offenses against international law	1	8	10
to declare war, grant letters of marque, etc.....	1	8	11
to raise armies, term of appropriations for.....	1	8	12
to provide a navy.....	1	8	13
to make rules for government of army and navy.....	1	8	14
to provide for calling out militia, suppressing insur-			
rections, etc.	1	8	15
arming, etc., the militia.....	1	8	16
exclusively to legislate for District of Columbia, etc..	1	8	17
to make laws for executing the powers of government	1	8	18
when it may prohibit importation of persons.....	1	9	1
to grant no title of nobility, and regulate receipt of			
honors, etc.....	1	9	8
no state to impose duties without consent of.....	1	10	2
no state to lay duties, form compacts, make wars, etc.,			
without consent of.....	1	10	3
may appoint time of choosing electors, and of their vot-			
ing	2	1	3
may provide for vacancy of president and vice-presi-			
dent	2	1	5
may decide how inferior officers may receive appoint-			
ment	2	2	2
president to give information, etc., to; when he can			
convene and adjourn.....	2	3	
when it may appoint place of trial.....	3	2	3
can declare punishment of treason.....	3	3	2
may prescribe how state acts, etc., shall be proved, etc.	4	1	
may admit new states, when consent of legislature re-			
quired	4	3	1
power of, over United States territory and property...	4	3	2
may propose constitutional amendments.....	5		
member of, to take oath to constitution.....	6		3
not to interfere with freedom of religion, of the press,			
and of the people to petition.....am.	1		
votes for president and vice-president to be counted			
before	12		1
amendments, power of, to enforce. (See AMENDMENTS.)			
right to vote for representatives to, effects of changing			
its exercise.....am.	14	2	
disability of members of, engaged in insurrection...am.	14	2	
may remove disabilities by a two-thirds vote.....am.	14	2	
members of, who were in insurrection, disqualified... 14		3	

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Connecticut, her representation in first congress.....	1	2	3
Consent of congress. (See CONGRESS, 1, 9; 1, 5, and 1, 10.)			
legislatures, when required in forming new state.....	4	3	
state, without it no state to be deprived of legal suffrage			
in senate	5		
states, this constitution adopted by the unanimous..	7		
required for quartering troops in houses during peace			
..... am.	3		
Constitution, congress can make laws for executing re-			
quirements of.....	1	8	18
president to take oath to support.....	2	1	7
judicial power to extend to cases arising under.....	3	2	1
not to be construed to prejudice claims.....	4	3	2
amendments to, how made.....	5		
former debts, etc., valid under.....	6		1
the supreme law of the land.....	6		2
of the states subordinate to that of the United States..	6		2
state and United States officers to take oath to support	6		3
ratification of nine states establishes the, in those			
states	7		
adopted unanimously by states present.....	7		
enumerated rights in, not to disparage other rights			
..... am.	9		
powers not delegated by the, etc., are reserved to the			
states or people..... am.	10		
effect of breaking oath taken to support..... am.	14	3	
Consuls, judicial power to extend to cases affecting.....	3	2	2
Contracts, no state shall pass laws impairing.....	1	10	1
Controversies, to what, the judicial power extends.....	3	2	1
Conventions for proposing and ratifying amendments to			
the constitution.....	5		
Corruption of blood, attainder not to work.....	3	3	2
Counsel, the criminally accused to have, for his defense			
..... am.	6		
Counterfeiting, congress can provide punishment for.....	1	8	6
Court. (See SUPREME COURT).....	2	2	2
Court, open, effect of confession in.....	3	3	1
of United States, when trial must be by jury..... am.	7		
Courts, congress can constitute inferior.....	1	8	9
in what United States judicial power is invested.....	3	1	
of law, who may appoint inferior officers of.....	2	2	2
Credit of United States, congress can borrow money on the	1	8	2
no state to emit bills of.....	1	10	1
each state to give, to acts, records, etc., of every other			
state	4	1	
Crime, fugitives on account of, to be delivered up.....	4	2	2
capital, how persons held to answer for..... am.	5		

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Crime may deprive of right to vote.....am.	14	2	
servitude for, a punishment.....	13	1	
trials for, to be by jury, except impeachment.....	3	2	3
Criminal cases, none compelled to testify against them selves in.....am.	5		
prosecutions, rights of accused persons in.....am.	6		
Cruel punishment not to be inflicted.....am.			
Death of president and vice-president, duty of congress in case of.....	2	1	5
Debate, senators and representatives not to be questioned for speech in.....	1	6	1
Debt of United States, validity of not to be questioned, am.	14	4	
insurrectionary, not to be assumed.....am.	14	4	
Debts of United States, congress has power to pay.....	1	8	1
no state to make anything but specie a tender in pay- ment of	1	10	1
former valid under this constitution.....	6		1
Defense, congress shall provide for the common.....	1	8	1
to provide for, constitution established. (PREAMBLE.) in criminal prosecution, has right to counsel for his am.	6		
Defend the constitution, president to take an oath to.....	2	1	7
Delaware, her representation in the first congress.....	1	2	3
Delegates of state legislaures to take oath to this constitu- tion	6		3
Demand, fugitive from justice to be delivered upon, of state	4	2	2
Departments, president may require written opinions of heads of.....	2	2	1
congress may invest appointing powers in heads of...	2	2	2
Direct tax, how to be apportioned.....	1	2	3
to be laid only in proportion to census.....	1	9	4
Disability, by whom incurred, how removed.....am.	14	3	
Discipline of militia, congress to provide for.....	1	8	16
Discoveries, exclusive right to secure to inventors.....	1	8	8
Disorderly behavior, each house may punish members for	1	5	2
Disqualification, judgment on impeachment a.....	1	3	7
District, government power over a, of ten miles square....	1	8	17
Divided, when senate equally vice-president to vote.....	1	3	4
Dock-yards, congress has exclusive power over.....	1	8	17
Domestic violence, United States to protect each state against	4	4	
tranquillity, constitution established to insure. (PRE- AMBLE.)			
Duties, congress has power to lay uniform.....	1	8	1
on imports, states not to lay, without congress' consent	1	10	2
of president, at his death, etc., devolve on vice-president	2	1	5

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Duties of executive departments, president may require			
opinion on	2	2	1
might have been imposed upon imported persons.....	1	9	1
not to be laid on exportations from any state.....	1	9	5
of tonnage, no state shall lay any, without congress'			
consent	1	10	3
Effect of proceedings, etc., of states, congress may prescribe			
the	4	1	
Effects, rights of people to be secure in their, not to be vio-			
lated	4		
Elected, representatives to be every second year.....	1	2	1
two senators from each state to be for six years.....	1	3	1
Election, writs of, to be issued in vacancies.....	1	2	4
of president and vice-president, their term of office....	2	1	1
appointment of electors of.....	2	1	2
how conducted.....am.	12	1	
who elected.....am.	12	2	
who ineligible.....am.	12	3	
Elections, when right to vote at, denied, the representa-			
tion decreased.....am.	14	2	
who shall prescribe time, place, etc., of, for senators,			
etc.	1	4	1
each house shall judge of the, of its members.....	1	5	1
Elector, who not qualified to be.....	2	1	2
a person who was in insurrection cannot be an....am.	14	3	
when right to vote for, denied, proportion of represen-			
tation reduced.....	14	2	
Electors, qualification of, for representative in congress...	1	2	1
of president, etc., appointment, qualifications, etc., of..	2	1	2
how to meet and vote.....am.	12		
persons who were engaged in insurrection, cannot be			
.....am.	14	2	
Eligibility of representatives in congress.....	1	2	2
senators in congress.....	1	3	3
Eligibility of electors of president and vice-president.....	2	1	2
president	2	1	4
vice-president	12	2	
Emancipation slave, neither the United States or state to			
pay any claim for.....am.	14	4	
Emolument, United States officers not to accept from any			
king, etc.....	1	9	8
president to have no, except his compensation.....	2	1	9
Emoluments that senators and representatives may not			
enjoy, what.....	1	6	2
Enemies, adhering to, etc., United States enemies, is trea-			
son	3	3	1
of United States, giving aid or comfort to, disqualifies			
.....am.	14	8	

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Enumeration of the people, when made.....	1	2	3
capitation tax to be the only proportion to.....	1	9	4
of rights in constitution not to disparage others...am.	9		
Equal suffrage in senate, no state to be deprived of without its consent.....	5		
Equity, judicial power to extend to cases in.....	3	2	1
to what cases judicial power shall not extend.....am.	11		
Escaping, persons held to labor, to be delivered up.....	4	2	3
Establish justice, etc., constitution formed to (PREAMBLE) and this constitution, ratification of nine states shall	7		
Establishment of religion, congress shall not regulate..am.	1		
Excessive bail, etc., not to be required.....am.	8		
Excises, congress has power to lay uniform.....	1	8	1
Exclusive rights to writing and discoveries.....	1	8	8
Executive, militia may be called to, the laws, etc.....	1	8	15
president to take oath to, his office.....	2	1	7
Executed, president to take care laws are faithfully.....	2	3	
Executive authority of any state to issue writs of election, etc.	1	2	4
officer of any state, effects of breach of oath.....am.	14	3	
officers, denying right to vote for, reduces representa- tion	14	2	
Expel a member, two-thirds of either house may.....	1	5	2
Expenditures, statements of, to be published.....	1	9	7
Exports from a state not to be taxed.....	1	9	5
states shall not lay duty on without consent of con- gress	1	10	2
<i>Ex post facto</i> law not to be passed.....	1	9	3
<i>Ex post facto</i> law not to be passed.....	1	10	1
Extraordinary occasions, president may convene congress on	2	3	
Fact and law, supreme court has appellate jurisdiction as to	3	2	2
Faith, full, to be given to public acts, etc., of a state.....	4	1	
Felonies, congress can define and punish on the seas.....	1	8	10
Felony, members of congress may be arrested for.....	1	6	1
fugitives charged with, to be delivered up.....	4	2	2
Fines, excessive, not to be imposed.....am.	8		
Foreign coin, congress has power to regulate value of.....	1	8	5
nations, congress has power to regulate commerce with	1	8	3
Foreign power, states not to enter into compact, etc., with	1	10	3
state, no present, etc., to be accepted from.....	1	9	8
judicial power of United States not to extend to suits with subjects of.....am.	11		
Forfeiture, attainder of treason not to work.....	3	3	2
Forts, congress has exclusive power over.....	1	8	17
Freedom of speech and the press, congress not to abridge am.	1		

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Fugitives from justice to be delivered up.....	4	2	2
Fugitives from labor to be delivered up.....	4	2	3
General welfare, this constitution established to promote. (PREAMBLE.)			
congress has power to provide for.....	1	8	1
Good behavior, judges to hold their offices during.....	3	1	1
Government of the United States, congress shall make laws for	1	1	18
republican form of, guaranteed.....	4	4	1
seat of established.....	1	8	17
Grand jury, persons held to answer only on presentation of	5		
Grievances, right of people to petition for redress of...am.	1		
<i>Habeas corpus</i> , not to be suspended except in rebellion, etc.	1	9	2
House, when soldiers not to be quartered in any.....am.	3		
of representatives, congress to consist of a senate and	1	1	
members to, elected every second year.....	1	2	1
qualifications of members of.....	1	2	2
shall choose speaker and officers.....	1	2	5
has sole power of impeachment.....	1	2	5
each, its power over members, quorums, and adjourn- ments of.....	1	5	1
may determine rules, punish, or expel a member.....	1	5	2
shall keep and publish a journal.....	1	5	3
neither to adjourn without consent.....	1	5	4
of representatives, revenue bills to originate in.....	1	7	1
when it shall choose the president.....am.	12	1	
Houses, right to people to be secure in.....am.	4		
of congress, shall propose constitutional amendments.	5		
president may convene either or both.....	2	3	
may remove disabilities.....am.	14	3	
Illegal, debts, etc., in aid of rebellion are.....	14	4	
Immunities, citizens of each state entitled to, of other states	4	2	1
of citizens not to be abridged.....am.	14	1	
Impeachment, house of representatives has sole power of..	1	2	5
senate has sole power to try.....	1	3	6
to be on oath, chief justice to preside.....	1	3	6
a two-thirds vote necessary to convict on.....	1	3	6
judgment to extend only to removal and disqualifica- tion	1	3	7
party convicted on, liable to punishment by law.....	1	3	7
president cannot grant pardon in case of.....	2	2	1
civil officers removed on conviction by.....	2	4	1
trial on, without jury.....	3	2	3
Importation of persons, when prohibited.....	1	9	1
Imports, congress has power to lay uniform.....	1	8	1
no state to lay, without consent of congress.....	1	10	2

	Art.	Sec.	Cl.
Inability of president or vice-president, in case of, who shall act.....	2	1	5
Indians not taxed excluded in representative enumeration	1	2	3
not taxed excluded in representative enumeration.am.	14	2	
Indictment necessary, to hold to answer for crime....am.	5		
persons convicted on impeachment subject to.....	1	3	7
Inferior courts, congress has power to create.....	1	8	9
invested with judicial power.....	3	1	
Inhabitant of his state, a representative in congress must be an.....	1	2	2
senator must be an.....	1	3	3
Inhabitants, male, as right to vote is denied to, representation is reduced.....am.	14	2	
Insurrection, United States to protect each state against..	4	4	
who disqualified by participating in.....am.	14	3	
debts for suppression of, etc., not to be questioned..am.	14	4	
in aid of, or for loss, etc., of slaves illegal.....am.	14	4	
Insurrections, congress may call out militia to suppress..	1	8	15
Invaded, states not to engage in war except when.....	1	10	3
Invasion, a cause for suspension of <i>habeas corpus</i>	1	9	2
United States to protect each state against.....	4	4	
congress may call out militia to expel.....	1	8	15
Inventors, exclusive rights of.....	1	8	8
Jeopardy, persons not to be twice put in.....am.	5		
Journal, each house to keep and publish a.....	1	5	3
president's objections and votes on reconsideration to be entered on.....	1	7	2
Judges of supreme court, how nominated and appointed...	2	2	2
duration in office and compensation of.....	3	1	
in every state bound by constitution, etc., over state laws	6	2	
Judgment, limitation of, in impeachment cases.....	1	3	7
Judicial power of United States, where vested.....	3	1	
its extent.....	3	2	1
proceedings, each state to give credit to, of other states	4	1	
officers to take oath to this constitution.....	6		3
effects of denying right to vote for.....am.	14	2	
engaged in insurrection, disqualified.....am.	14	3	
power of United States, limit of construction as to extent of.....am.	11		
to extend to maritime and admiralty jurisdiction.....	3	2	1
Jurisdiction, original and appellate of supreme court.....	3	2	2
no slavery within.....am.	13	1	
of the crime, fugitives to be removed to state having..	4	2	2
no new state to be erected within the, of another state	4	3	1
Jury, trials, except in impeachment, to be by.....	3	2	3
persons to answer charge of crime only by action of.am.	5		

	Art.	Sec.	Cl.
Jury, right of accused to trial by an impartial.....am.	6		
trial by, in suits at common law.....am.	7		
fact tried by, may not be re-examined, except, etc..am.	7		
Justice, constitution ordained to establish. (PREAMBLE.)			
chief, shall preside when president tried on impeach-			
ment	1	3	6
fugitive from, to be delivered up.....	4	2	2
King, prince, etc., honors, etc., from, received only by con-			
sent of congress.....	1	9	8
Labor due in one state not to be abrogated in another.....	4	2	3
Land and naval forces, congress to make rules for govern-			
ment of.....	1	8	14
Land owned by United States, congress to have power over	1	8	17
Lands, claims, judicial power in controversies for.....	3	2	1
Law, persons convicted on impeachment punished by.....	1	3	7
how bills in congress become.....	1	7	2
may become without president's signature.....	1	7	2
of nations, congress may define and punish offenses			
against	1	8	10
<i>ex post facto</i> , not to be passed.....	1	9	3
no state shall pass.....	1	10	1
impairing contracts, no state shall pass.....	1	10	1
and equity, to what cases in, judicial power shall ex-			
tend	3	2	
in fact, supreme court has appellate jurisdiction as to..	3	2	2
constitution and treaties, the supreme law of the land	6		2
congress to make no, interfering with the press, etc.am.	1		
due process of, necessary for the depriving of life, etc.			
..... am.	5		
due process of, necessary for the depriving of life by			
any state.....am.	14	1	
to ascertain district in which crime committed....am.	6		
suits at common, how regulated.....am.	7		
or equity, how extent of United States judicial power			
construed in.....am.	11		
every person to enjoy equal protection of the....am.	14	1	
debt authorized by, validity of not to be questioned.am.	14	4	
no state, shall abridge privileges of citizens.....am.	14	1	
Laws of naturalization and bankrupt to be uniform.....	1	8	4
of the Union, congress may call militia to execute....	1	8	15
congress may make, for executing powers of govern-			
ment	1	8	18
inspections, states, exception of law-making power in			
favor	1	10	2
state, on imposts, subject to congressional revision....	1	10	2
president to take care all, are faithfully executed....	2	3	

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Legislation, when congress has exclusive.....	1	8	17
congress may enforce amendment XIII by.....am.	13	2	
congress may enforce amendment XIV by.....am.	14	5	
congress may enforce amendment XV by.....am.	15	2	
Legislature, state electors for, can vote for congressional			
representative	1	2	1
of each state shall choose two senators.....	1	3	1
to prescribe time, etc., holding elections for senators,			
etc.	1	4	1
can apply to United States for protection, etc.....	4	4	1
disqualification for having taken oath as member of			
..... am.	14	2	
effects of denying right to vote for members of....am.	14	2	
Legislatures of states, consent of, when required by United			
States in purchasing	1	8	17
may direct how electors shall be appointed.....	2	1	2
when consent of, required in forming new states.....	4	3	1
may apply for or ratify amendments.....	5		
members of, to take oath to support constitution.....	6		3
Letters of marque, congress may grant.....	1	8	11
Liberty, no person to be deprived of, without process of			
law	5		
no person to be deprived of, by any state law.....am.	14	1	
Life, consequences of treason not to extend beyond.....	3	3	2
not to be put twice in jeopardy.....am.	5		
to be taken only by process of law.....am.	5		
to be taken only by process of law.....am.	14	1	
List of electoral votes to be male.....am.	12		
Loss of any slave not to be paid by United States.....am.	14	4	
Magazines, forts, etc., congress to have exclusive power			
over	1	8	17
Majority of each house to constitute a quorum.....	1	5	1
the electors necessary to elect president or vice-presi-			
dent	12		
Majority of states to choose president when house elects			
him	12		
members to choose vice-president when senate elects			
him	12		
Maritime jurisdiction, judicial power to extend to.....	3	2	1
Marque, congress may grant letters of.....	1	8	11
no state shall grant letters of.....	1	10	1
Maryland, her representation in first congress.....	1	2	3
Massachusetts, her representation in first congress.....	1	2	3
Males, when vote denied to any, representation reduced			
..... am.	14	1	
Measures, president to recommend to congress.....	2	3	1
congress may fix standard of.....	1	8	5

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Member of state legislature, effects of breach of oath...am.	14	3	
Militia, congress may provide for calling out.....	1	8	15
congress may provide for organizing, disciplining, etc.	1	8	16
president commander-in-chief of, when.....	2	2	1
necessary to a free state.....am.	2		
excepted from certain privileges.....am.	5		
Ministers. (See APPOINTMENTS; AMBASSADORS.).....	2	2	2
public, president to receive.....	2	3	
Misdemeanors, civil officers to be removed on conviction for	2	4	
Money, congress has power to borrow.....	1	8	2
congress has power to coin, etc.....	1	8	5
congress may appropriate for army but for two years..	1	8	12
to be drawn from treasury only on appropriation.....	1	9	7
excepted from certain privileges.....am.	5		
no state shall coin	1	10	1
Names of members, when to be entered upon journal.....	1	5	3
Natural-born citizens only eligible for the presidency.....	2	1	4
Naturalized persons are citizens of their state and of the United States.....am.	14	1	
Naturalization, congress may establish uniform rule for..	1	8	4
Naval forces, congress may make rules for government of	1	8	14
excepted from certain privileges.....am.	5		
Navy, congress may provide and maintain a	1	8	13
the president commander-in-chief of the	2	2	1
New Hampshire, her representatives in first congress....	1	2	3
New Jersey, her representatives in first congress	1	2	3
New York, her representatives in first congress	1	2	3
New states may be admitted by congress	4	3	1
Nobility, no title of, to be granted by the United States..	1	9	8
no title of, to be granted by a state	1	10	1
Nominations, what, the president may make	2	2	2
Oath, senators to be on, in impeachment	1	3	6
form of, taken by president	2	1	7
by senators, representatives, etc., to support constitu- tion	6		3
required for issue of warrant	4		
disqualification by breach of	14	3	
Obligation of contracts not to be impaired	1	10	1
insurrectionary to be held illegal and not assumed..	14	4	
Offense, persons not to be put in jeopardy twice for same	5		
against law of nations may be defined and punished..	1	8	10
president may pardon for, against United States	2	2	1
Office, judgment in impeachment shall extend only to re- moval	1	3	7
senators and representatives not to hold, etc.	1	6	2

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Office, persons holding under United States not to accept presents, etc.	1	9	8
persons holding under United States not to be electors	2	1	2
when president removed from, how vacancy filled....	2	1	5
oath of, of president	2	1	7
departmental, president may require opinion of head of each	2	2	1
judges to hold during good behavior	3	1	
Officers, house of representatives shall choose their.....	1	2	5
senate shall choose their	1	3	5
of militia, appointed by each state	1	8	16
of United States, president shall commission	2	3	
shall be removed on impeachment and conviction....	2	4	
executive and judicial, to take oath to constitution..	6		3
executive, etc., effects of denying rights to vote for	14	2	
effects of breach of oath as, by insurrection.....am.	14	3	
Opinion, president may require, of heads of departments..	2	2	1
Order in which both houses concur to be presented to president	1	7	3
Original jurisdiction, when supreme court to have	3	2	2
Originate, revenue bills, shall, in the house of representatives	1	7	.1
Overt act, no treason unless two witnesses testify to same	3	3	1
Papers, people to be secure against unreasonable searches	4		
Pardons, president may grant	2	2	1
Patent-rights, congress may grant	1	8	8
Peace, for a breach of, a senator or representative may be arrested	1	6	1
no state in time of, to keep troops, etc.	1	10	3
in time of, soldiers not to be quartered in any house	3		
Penalties, each house may impose, to secure attendance of members	1	5	1
Pennsylvania, her representation in first congress.....	1	2	3
Pensions, debt incurred in payment of, not to be questioned	14	4	
People, house of representatives to be chosen by	1	2	1
when census of, to be taken	1	2	3
right of, to bear arms, etc.am.	2		
to be secure in persons, etc.am.	4		
rights retained by	9		
powers reserved to the	10		
Piracies, congress may define and punish, on the seas....	1	8	10
Ports, regulation as to preference, clearing, etc.	1	9	6
Posterity, constitution established to secure blessings to.			
(PREAMBLE.)			

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Post-office and roads, congress may establish	1	8	7
Power to impeach, in house of representatives	1	2	5
to try impeachment, lies in the senate	1	3	6
executive, vested in president	2	1	1
to grant reprieves and pardons, lies in president	2	2	1
to make treaties, appointments, etc., lies in president	2	2	2
judicial. (See JUDICIAL POWER.)	3	2	1
restrictions on its constructive extent.....am. 11			
of congress to enforce amendments. (See AMEND- MENTS.)			
Powers of congress to give effect to powers of government	1	8	18
when president unable to discharge, they devolve on vice-president	2	1	5
not delegated to United States, etc., reserved.....am. 10			
Preference not to be given to one port over another.....	1	9	5
Prejudice, constitution not to, claim of United States....	4	3	2
Present from king, etc., not to be, without congress con- sent	1	9	8
Presentment of grand jury when crime is charged....am. 5			
President, when senate shall choose a temporary.....	1	3	5
bills passed by congress to be presented to.....	1	7	2
effect of, delaying to sign bill	1	7	2
orders, joint resolutions, etc., to be presented to....	1	7	3
executive power vested in, his terms of office.....	2	1	1
how balloted for, and how votes counted.....am. 12			1
when elected by house of representatives.....am. 12		1	
when vice-president shall act as.....am. 12			1
who eligible for	2	1	4
when powers, etc., of, devolve on vice-president.....	2	1	5
compensation of, which is not to be altered.....	2	1	6
form of oath taken by	2	1	7
is commander-in-chief	2	2	1
power to make treaties, nominate, and appoint.....	2	2	2
fill vacancies	2	2	3
to give information, etc., to congress.....	2	3	
removed on conviction on impeachment.....	2	4	
effect of denying right to vote for	14	2	
Press, freedom of, not to be abridged.....am. 1			
Prince, no present, etc., from to be accepted without con- sent	1	9	8
Principal officer of departments required to give opinion	2	2	1
Private property, to be compensated for when taken..am. 5			
Privileged, when senators and representatives, from ar- rest	1	6	1
Privileges, citizens of each state entitled to, of each other state	4	2	1
of citizens not to be abridged.....am. 14		1	

	Art.	Sec.	Cl.
Proceedings, each house may determine the rules of its..	1	5	2
shall keep journal of its.....	1	5	3
credit, etc., to be given to, of other states.....	4	1	
Process of law, no depriving of life, etc., without.....am.	5		
compulsory, accused entitled to, to obtain wit- nesses	6		
Prohibited powers, reserved to states and people....am.	10		
Promote the general welfare, constitution established to. (PREAMBLE.)			
Property of the United States, congress shall legislate for	4	3	2
no person to be deprived of, without process of law	5		
private, not to be taken without compensation....am.	5		
state not to deprive citizen of, without process of law	14	1	
Proportion of representation to that of voting inhabi- tants	14	2	
Prosecutions, criminal, rights of accused persons in..am.	6		
Protect the constitution, president to take an oath to....	2	1	7
United States shall, each state against invasion.....	4	4	
Protection, no state shall deny equal protection of laws to	14	1	
Public records, etc., of states to have full credit, etc.....	4	1	
danger, no state to engage in war without consent, except in	1	10	3
debt, validity of, not to be questioned.....am.	14	4	
ministers, president to receive	2	3	
money, receipts and expenditures of, to be published	1	9	7
safety may require suspension of <i>habeas corpus</i>	1	9	2
trust, no religious test required for any office of.....	6		3
use, compensation for property taken for.....am.	5		
Punishment, persons convicted by impeachment liable to	1	3	7
congress to provide for, of counterfeiters.....	1	8	6
treason	3	3	2
for crime, servitude a.....am.	13	1	
Punishments, cruel, not to be inflicted.....am.	8		
Qualifications of a representative.....	1	2	2
of a senator	1	3	3
to office	6		3
of electors of representatives.....	1	2	1
of its own members, each house shall judge of.....	1	5	1
of president	2	1	4
of vice-president	12		3
Quartered, soldiers not to be in house without owner's con- sent	3		
Question, yeas and nays on, when to be entered on journal	1	5	3
of adjournment, excepted from veto power.....	1	7	3

	Art.	Sec.	Cl.
Questioned, members for speech in debate, not to be....	1	6	1
validity of United States public debt not to be...am.	14	4	
Quorum, what constitutes a, in each house.....	1	5	1
of house of representatives for the election of presi-			
dent	12		2
of senate for the election of vice-president.....am.	12		2
Race, right to vote not to be abridged on account of..am.	15	1	
Ratification of nine states to establish constitution.....	7		
Rebellion, a cause for suspension of <i>habeas corpus</i>	1	9	2
denial of right to vote.....am.	14	2	
who disqualified by participation in.....am.	14	3	
debt for suppression of, not to be questioned....am.	14	4	
debt incurred in aid of, not to be assumed.....am.	14	4	
Receipts and expenditures statement of, to be published..	1	9	7
Recess of senate, president may fill vacancies during....	2	2	3
Reconsidered, bills objected to by president to be.....	1	7	2
joint resolution, etc., by president to be.....	1	7	3
Records of each state to have credit, etc., in each other			
state	4	1	1
Redress of grievances, right of people to assemble and pe-			
tition for	1		
Regulations of one state not to discharge labor due in an-			
other	4	2	3
congress may make, for territory and other United			
States property	4	3	2
Religion, congress not to establish or prohibit any....am.	1		
Religious test, not to be required as a qualification for			
office	6		3
Representation, reduced, when right to vote is denied,			
etc.,	14	2	
vacancies in, state executive to issue writs.....	1	2	4
Representative, qualifications of a.....	1	2	2
Representatives, what persons who were in rebellion can-			
not be	14	3	
how apportioned among the states.....	14	2	
no shall be appointed presidential elector.....	2	1	2
congress shall consist of senate and.....	1	1	
when members of house of, elected.....	1	2	1
and direct taxes, how apportioned.....	1	2	3
allowed in first congress to the thirteen states.....	1	2	3
house of, shall choose speaker, etc.....	1	2	5
have sole power of impeachment.....	1	2	5
time, place, and manner of elections for.....	1	4	
house of, shall be judges of elections, etc.....	1	5	1
a majority of, constitutes a quorum.....	1	5	1
house of, make rules, punish, and expel members....	1	5	2
shall keep and publish a journal.....	1	5	3

	Art.	Sec.	Cl.
Representatives, adjournment of, when requires senate's consent	1	5	4
receiving compensation, be privileged from arrest, etc.	1	6	1
revenue bills shall originate in house of.....	1	7	1
to take oath to support the constitution.....	6		3
effects of breach of official oath taken as.....am.	14	3	
Reprieves, president may grant.....	2	2	1
Reprisal, congress may grant letters of.....	1	8	11
no state shall grant letters of.....	1	10	1
Republican form of government, the United States shall guarantee a	4	4	1
Reserved, powers, to the state or the people.....am.	10		
Residence of fourteen years, required for president or vice-president	2	1	4
Resolution, joint, to be presented to president.....	1	7	3
Retained, rights, by the people.....am.	9		
Returns of its members, each house shall judge of.....	1	5	1
Revenue bills, to originate in house of representatives... powers of senate over.....	1	7	1
regulations to be without preference.....	1	9	6
Rhode Island, its representation in first congress.....	1	2	3
Right of people to assemble and petition, not to be abridged	1		
bear arms, not to be infringed.....am.	2		
be secure, etc., not to be violated.....am.	4		
trial by jury	7		
to vote, how basis of representation proportioned to	14	2	
Rights to writings and discoveries to be secured.....	1	8	8
enumeration of, in constitution, not to disparage others	9		
Rules of naturalization, to be uniform.....	1	8	4
of proceedings, each house of congress may fix its....	1	5	2
concerning captures, congress may make.....	1	8	11
for land and sea forces, congress may make.....	1	8	14
of common law, re-examination by, in United States courts	7		
Science, congress may promote by granting exclusive rights	1	8	8
Searches and seizures, right of people to be secure from	4		
Seat of government, congress has exclusive legislation over	1	8	17
Seats of senators, terms at which vacated.....	1	3	2
Secrecy, congress not to publish what may require.....	1	5	3
Secure the blessings of liberty, constitution established to. (PREAMBLE.)			
rights of people to be, in their persons, etc.....am.	4		

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Securities of United States, punishing counterfeiters of..	1	8	6
Security of a free state, a militia necessary to.....am.	2		
Seizures, right of people to be secure against.....am.	4		
Senate and house of representatives, congress to consist of	1	1	
how composed	1	3	1
vice-president to be president of.....	1	3	4
may choose its officers and temporary president.....	1	3	5
has sole power to try impeachments.....	1	3	6
judgment of, in impeachment, its effect.....	1	3	7
to judge of election returns of its own members.....	1	5	1
a majority to form a quorum.....	1	5	1
may compel attendance of absent members.....	1	5	1
determine its rules, and punish or expel members....	1	5	2
to keep and publish a journal.....	1	5	3
not to adjourn over three days without consent.....	1	5	4
power of, over revenue bills.....	1	7	1
power of, over treaties, nominations, and appointments	2	2	2
equal suffrage in, no state to be deprived of.....	5		
list of votes for president and vice-president sent to president ofam.	12		2
president of, to open certificates of electors of presi- dent, etc.am.	12		1
to choose vice-president, when and how.....am.	12		1
Senator, each to have one vote.....	1	3	1
qualifications for	1	3	3
to what offices disqualified	1	6	2
persons holding office under United States disquali- fied for	1	6	2
a, cannot be a presidential elector.....	2	1	2
effects of breach of official oath taken as.....am.	14	3	
who, having been in rebellion, may not be a.....am.	14	3	
Senators, to be two from each state, chosen by the legisla- ture	1	3	1
how divided after first election.....	1	3	2
vacancies filled temporarily	1	3	2
time, place, and manner of electing.....	1	4	1
to receive compensation, be privileged from arrest, etc.	1	6	1
to take oath to support constitution.....	6		3
Service, persons bound to, included in representative num- bers	1	2	3
of United States militia, congress to provide for gov- erning	1	8	16
militia, the president their commander-in-chief.....	2	2	1
excepted from certain privileges, etc.....am.	5		
Services, compensation for, to the president.....	2	1	6
compensation for, to senator and representative.....	1	6	1
compensation for, to the judges.....	3	1	1

	Art.	Sec.	Cl.
Services, debt incurred for, against rebellion not to be questioned	am. 14	4	
Servitude, involuntary, prohibited in United States..	am. 13	1	
previous condition of, not to abridge right to vote..	am. 15	1	
Session, congress to be in, every year.....	1	4	2
rule for adjournment during, of congress.....	1	5	4
Ships of war, no state to keep, without consent of congress	1	10	3
Slavery prohibited in United States.....	am. 13	1	
Slaves, three-fifths of, included in representative numbers	1	2	3
importation of, how long permitted.....	1	9	1
escaping to be delivered up.....	4	2	3
loss or emancipation of, not to be paid for.....	am. 14	4	
Soldiers not to be quartered in houses without consent	am. 3		
South Carolina, her representation in the first congress..	1	2	3
Speaker and other officers, each house shall elect.....	1	2	5
Speech in debate, members not to be questioned for.....	1	6	1
freedom of, not to be abridged.....	am. 1		
Standard, congress may fix, of weights and measures....	1	8	5
State of the Union, president to inform congress respecting	2	3	1
each, to have at least one representative in congress..	1	2	3
representation of, when vacancy in, writs to be issued	1	2	4
each to have two senators.....	1	3	1
senator, vacancies of, filled by temporary appointment	1	3	2
elections for senators and representatives of, how prescribed	1	4	1
no tax to be imposed on articles exported from.....	1	9	5
ports of one, not to have preference over those of another	1	9	6
a, shall not enter into alliances, grant letters of marque, etc.	1	10	1
what to make legal tender, pass no <i>ex post facto</i> law, etc.	1	10	1
a, to make no law impairing contracts.....	1	10	1
to grant no title of nobility	1	10	1
not to lay duties on imports, etc., without consent..	1	10	2
to lay no duties on tonnage, keep troops or ships of war	1	10	3
not to make compacts or engage in war.....	1	10	3
each to appoint electors of president and vice-president	2	1	2
extent of judicial power over.....	3	2	1
when a party, supreme court has original jurisdiction	3	2	2
trial to be in the, where crime committed.....	3	2	3
each, to give credit to records, etc., of each other state	4	1	1

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
State, citizens of, entitled to privileges of those of other			
states	4	2	1
a fugitive from justice from any, to be given up....	4	2	2
a fugitive from labor from any, to be given up.....	4	2	3
United States to guarantee every, a republican form			
of government	4	4	1
protect from invasion and domestic violence.....	4	4	1
not to be deprived of equal suffrage in senate.....	5		
judges in, bound by constitution, etc., of United States	6		2
legislatures, members of, to take oath to constitution	6		3
effect of breach of oath as.....am.	14	3	
denying right to vote for	14	2	
each, to have one vote when house elects the presi-			
dent	12		1
citizens of the United States are citizens of the, in			
which they reside	14	1	
no, shall abridge privileges, etc., of citizens of the			
United States	14	1	
shall not deprive of life, etc., without process of			
law	14	1	
shall not deny any person equal protection of			
laws	14	1	
any male inhabitant of a, effect of denying vote			
to	14	2	
who may not hold office under	14	3	
executive or judicial officer of, effect of breach of oath			
as	14	3	
no, to assume debt, etc., incurred in aid of insurrec-			
tion	14	4	
for loss of any slave.....am.	14	4	
abridge right to vote on account of color, etc.....am.	15	1	
States, to choose representatives in congress every two			
years	1	2	1
representatives and direct taxes, how apportioned			
among	1	2	3
what, entitled to representation in the first congress..	1	2	3
congress may regulate commerce among.....	1	8	3
have the right to train and appoint officers of militia	1	8	16
president to receive emolument from none of the....	2	1	6
new, admitted, when consent of legislature required..	4	3	1
constitutional amendments to be ratified by three-			
fourths of	5		
ratification of nine, established this constitution....	7		
powers not prohibited by, to United States, or delegated,			
or reserved	10		
United. (See UNITED STATES.)			
Subjects, foreign, when judicial power extends to.....	3	2	1
does not extend to.....am.	11		

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Suffrage, no state to be deprived of its, in the senate....	5		
Suits, right to trial by jury in.....am.	7		
what, United States judicial power not construed to extend toam.	11		
Sundays excepted from ten days allowed president to re- turn bill, etc.	1	7	2
Supreme court, judicial power of United States in, and inferior courts	3	1	
judges of, to hold office during good behavior.....	3	1	
compensation of	3	1	
when original, and when appellate jurisdiction.....	3	2	2
congress to make regulations for.....	3	2	2
law of the land, what is.....	6		2
Tax, no direct, to be laid, unless in proportion to census	1	9	4
a, might have been imposed up to 1808 on imported persons	1	9	1
no amendment before 1808, to affect first and fourth clause of the ninth section.....	5		
not to be laid on exports from any state.....	1	9	5
Taxed, Indians not taxed excluded from representative numbers	1	2	3
Indians not taxed excluded from representative num- bers,.....am.	14	2	
Taxes, direct, how apportioned among states.....	1	2	3
congress shall have power to lay and collect.....	1	8	1
Tender, no state to make anything but gold and silver a	1	10	1
Term of office of representative in congress, two years..	1	2	1
senator, six years	1	3	1
president and vice-president, four years.....	2	1	1
citizenship of representative in congress, seven years	1	2	2
of senator in congress, nine years.....	1	3	3
ten years, census to be taken every.....	1	2	3
years, person bound for included in representative numbers	1	2	3
Territories, congress shall have exclusive jurisdiction over	1	8	17
congress shall make needful laws respecting.....	4	3	2
Test, no religious, required as a qualification for office..	6		3
Testimony of two witnesses required to convict of treason	3	3	1
Time of choosing electors may be determined by congress	2	1	3
Title of nobility, not conferred by United States, or ac- cepted without consent	1	9	8
no state shall grant.....	1	10	1
Tonnage, no state lay duty on without consent.....	1	10	3
Training of militia, authority for, reserved to the states	1	8	16
Tranquility, constitution established to secure domestic. (PREAMBLE.)			
Treason, a senator or representative may be arrested for	1	6	1
civil officers to be removed on conviction of.....	2	4	1

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Treason against United States, in what it consists.....	3	3	1
congress has power to punish.....	3	3	2
fugitives charged with, to be delivered up.....	4	2	2
Treasury, senators and representatives to be paid out of	1	6	1
money drawn from, only on legal appropriation.....	1	9	7
duties, etc., laid by states on imports, etc., to go to			
United States.....	1	10	2
Treaties, president to make with advice, etc., of senate...	2	2	2
judicial power to extend to cases under.....	3	2	1
are supreme law of the land.....	6		2
Treaty, no state shall make.....	1	10	1
Trial, persons convicted on impeachment, punished by law	1	3	7
accused has a right to a speedy and public.....am.	6		
Trial, except impeachment, to be by jury.....	3	2	
to be in the state where the crime was committed....	3	2	3
by jury in suits by common law.....am.	7		
Tribunals, congress may constitute inferior.....	1	8	9
Troops, no state shall keep, without consent of congress..	1	10	3
Two-thirds of senate must concur to convict on impeach-			
ment	1	3	6
each house may expel a member.....	1	5	2
both houses may pass a bill over president's veto.....	1	7	2
both houses may pass a resolution, etc., over presi-			
dent's veto.....	1	7	3
senate with the president, make treaties.....	2	2	2
both houses may propose constitutional amendments..	5		
of all the state legislatures may call a convention to			
propose constitutional amendments.....	5		
representatives from, of the states must be in the			
house to elect a president.....am.	12		
the senate must attend to elect a vice-president....am.	12		
vote of congress can remove disability.....am.	14	3	
Uniform, all duties, imports, and excises must be.....	1	8	1
rules for naturalization, and bankruptcy law, must be	1	8	4
Union, the constitution established to form a more per-			
fect. (PREAMBLE.)			
state of, president to give information, etc., respecting			
the	2	3	1
new state may be admitted into the.....	4	3	1
United States, the constitution ordained of the. (PRE-			
AMBLE.)			
congress of, legislative powers vested in.....	1	1	1
to provide for the defense and welfare of.....	1	8	1
counterfeiting securities and coin of, to be punished...	1	8	6
establishment of seat of government of.....	1	8	17
congress to make laws for government of.....	1	8	18
no title of nobility shall be granted by.....	1	9	8

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
United States, consent of, necessary for a state to lay im-			
posts, etc.	1	10	2
executive power of, vested in president.....	2	1	1
president of. (See PRESIDENT.)			
judicial power of. (See JUDICIAL; JUDGE.)			
claims of, not to be prejudiced.....	4	3	2
shall guarantee every state a republican form of gov-			
ernment	4	4	
former debts of, valid.....	6		2
no religious test required for office under.....	6		3
powers not delegated to, or prohibited, are reserved			
..... am.	10		
slavery shall not exist in.....am.	13	1	
persons born or naturalized in, are citizens of the am.	14	1	
privileges of, etc., of citizens of, no state shall abridge			
..... am.	14	1	
citizens of, effect of denying vote to.....am.	14	2	
effect of breach of oath taken as an officer of.....am.	14	3	
validity of debt of, incurred in suppressing rebellion,			
not to be questioned.....am.	14	4	
United States, not to pay any debt incurred in aid of			
insurrection	am.	14	4
claim for loss or emancipation of slaves.....am.	14	4	
right of citizens of, to vote, not to be denied.....am.	15	1	
Vacancies in state representation, writs to be issued to fill	1	2	4
in senate, how filled.....	1	3	2
what, the president may temporarily fill.....	2	2	3
Validity of debts of United States not to be questioned.am.	14	4	
Value, congress to regulate, of coin.....	1	8	5
in controversy, when over twenty dollars, the trial to			
be by jury.....am.	7		
Vessels from or to one state not obliged to clear, etc., in			
another	1	9	6
Vest, congress may vest power to make certain appoint-			
ments in president, or, etc.....	2	2	2
Veto power of president. (See PRESIDENT.)			
Vice-president, his qualifications.....	12		3
his term of office.....	2	1	1
election of, when senate shall choose.....	12		2
list of votes for, sent to president of the senate.....	12		1
president of senate to open certificates of electors for..	12		1
when he shall act as president.....	12		1
duties of president shall devolve on.....	2	1	5
in absence of, senate to choose a president <i>pro tem</i>	1	3	5
has no vote in senate, except in case of tie.....	1	3	4
effect of denying right to vote for.....am.	14	2	
Violated, right of people to secure, etc., shall not be...am.	4		

	<i>Art.</i>	<i>Sec.</i>	<i>Cl.</i>
Virginia, her representation in first congress.....	1	2	3
Void, debt incurred in aid of insurrection is.....am.	14	4	
Vote, each senator shall have one.....	1	3	1
vice-president has only a casting vote.....	1	3	4
joint, every, to be presented to president.....	1	7	3
in congress, when it must be by yeas and nays.....	1	7	2
of presidential electors, how given and transmitted am.	12		1
taken by states, in choosing president by house of rep- resentativesam.	12		1
when right to abridged, basis of representation re- ducedam.	14	2	
not to be denied, on account of color, etc.....am.	15	1	
congress may by a two-thirds vote, remove disability am.	14	3	
War, congress may declare.....	1	8	11
no state to make, without consent of congress.....	1	10	3
levying, against United States is treason.....	3	3	1
in time of, how soldiers quartered in citizen's house am.	3		
in time of, when jury presentment dispensed with.am.	5		
Warrants may be issued only on probable cause, etc...am.	4		
Weights and measures, congress has power to fix standard ofam.	1	8	5
Welfare, congress has power to support the general.....	1	8	1
Witness against himself, no person shall be compelled to beam.	5		
Witnesses, persons criminally accused, to be confronted witham.	6		
persons criminally accused, to have process for....am.	6		
two, necessary for conviction on charge of treason...	3	3	1
Writings, exclusive right to, may be secured.....	1	8	8
Yeas and nays of either house, when must be entered on journalam.	1	5	8
when vote must be taken by.....	1	7	2

INDEX TO JUDICIARY ACTS AND OTHER ACTS OF CONGRESS—APPENDIX II.

References are to pages.

Act September 24, 1789.....	845-864
Act March 3, 1875.....	865-870
Act March 3, 1887, as corrected by act of August 13, 1888.....	871-1876
Act March 3, 1891.....	877-1883
Joint resolution organizing Circuit Court of Appeals.....	884
Act amending sec. 7, act March 3, 1891.....	885
Act amending sec. 5, act March 3, 1891.....	886
Act amending sec. 7, act March 3, 1891.....	887
Act to provide for suits against United States.....	888-893
Sherman Anti-Trust Act.....	894-895
Elkins Act.....	896-899
Act amending act to regulate commerce.....	900-919
Safety Appliances Act	920

INDEX TO RULES OF THE SUPREME COURT— APPENDIX III.

	<i>Rule</i>	<i>Sec.</i>	<i>Page</i>
Adjournment	27		939
Admiralty, record in.....	8	6	927
Appearance of counsel.....	9	3	923
for plaintiff, no.....	16		933
defendant, no.....	17		933
either party, no.....	18		933
Appeals in cases involving jurisdiction of circuit court	32		935
under act of March 3, 1891.....	36		943
Argument, oral.....	22		935
order of.....	22	1	935
time allowed for.....	22	3	935
on motions.....	6	2	924
printed	20		933
submission on.....	20	1	933
not received after submission.....	20	4	933
Assignment of errors.....	21	2, 4	934
under act of March 3, 1891.....	35	.1	942
Attachment for clerk's fees.....	10	8	928
Attorneys, admission of.....	2	1	923
oath of.....	2	2	923
Bail, when and how granted.....	36	2	943
Bill of exceptions.....	4		924
Briefs	21		934
contents of.....	21	2	934
time for filing by plaintiff in error or appellant	21	1	934
defendant in error or appellee	21	3	934
form of printed.....	21		934
not received after argument.....	20	4	933
Cases involving same question may be heard together	26	8	938
passed, how restored to call.....	26	9	938
dismissal of, in vacation.....	28		940
<i>Certiorari</i>	14		931
Circuit courts of appeals, cases from, etc.....	36 and 37		943
Citation, service of.....	8	5	926
Clerk	1		923

	<i>Rule.</i>	<i>Sec.</i>	<i>Page</i>
Clerk's fees, table of.....	24	7	942
attachment for	10	8	928
Conference-room library.....	7	3	924
Costs of printing record.....	10	2, 6, 7	928
how taxed.....	24		936
Costs, none recoverable in cases where United States			
is party.....	24	4	936
Counsel, admission of.....	2	1	936
appearance of.....	9	3	927
no appearance of.....	18		933
two only to be heard on argument.....	22	2	935
time allowed for argument.....	22	3	935
motions	6	2	924
Custody of prisoners on <i>habeas corpus</i>	34		942
Damages for delay.....	23	2	935
Defendant, no appearance of.....	17		933
Death of a party.....	15		965
defendant in error or appellee after judg-			
ment in lower court.....	15	3	931
Dismissal in vacation.....	28		940
Docketing cases.....	9		927
by plaintiff in error or appellant.....	9	1	927
defendant in error or appellee.....	9	2	927
Docket, call of.....	26		938
day-call	26	2	938
Errors, assignment of.....	21	4	934
specification of	21	2	934
Evidence, new, how taken.....	12	1	930
in admiralty.....	12	2	930
in the record, objections to.....	13		930
Exceptions, bill of.....	4		924
Exhibits of material.....	33		941
Fees, table of clerk's.....	24	7	936
attachment for.....	10	8	928
security for.....	10	1	928
<i>Habeas corpus</i> , custody of prisoners on.....	34		942
Interest	23		935
in admiralty.....	23	4	935
in equity.....	23	3	935
at law.....	23	1	935
under act of March 3, 1891.....	38		944
Jurisdiction—cases involving circuit court.....	32		941
Law library.....	7		925
mode of obtaining books from, by counsel	7	1	925
clerk to deposit records in.....	7	2	925
of conference-room.....	7	3	925

	<i>Rule.</i>	<i>Sec.</i>	<i>Page</i>
Mandates	39		944
Mandate in case dismissed.....	24	5	936
in vacation	28		940
Motions	6		924
to be in writing.....	6	1	924
notice of.....	6	3, 4	924
time allowed for argument.....	6	2	924
to affirm.....	6	5	924
to dismiss.....	6	4	924
Motions, notice and service of briefs.....	6	4	924
submission of.....	6	4	924
to advance.....	26	6	938
cases once adjudicated.....	26	4	938
criminal cases.....	26	3	938
revenue cases.....	26	5	938
cases involving jurisdiction of cir cuit court.....	32		941
Motion-day	6	6	925
Opinions of the supreme court.....	25		972
court below to be annexed to record	8	2	926
Original papers not to be taken from court-room or clerk's office.....	1	2	923
from court below.....	8	4	926
Parties, death of.....	15		931
Plaintiff, no appearance of.....	16		932
Practice	3		923
Process, form of.....	5	1	924
service of.....	5	2, 3	924
Record	8		926
return of	8	1	926
to return all necessary papers in full.....	8	3	926
opinion of court below.....	8	2	926
translations of papers in foreign lan- guage	11		930
printed under supervision of clerk.....	10	5	928
printed form of.....	31		975
printing parts of.....	10	9	928
cost of.....	10	2	928
certiorari for diminution of.....	14		928
, in admiralty cases.....	8	6	926
in cases coming up under act of March 3, 1891	37		943
how printed.....	35	2	942
Rehearing	30		940
Representatives of deceased parties appearing.....	15	1	931
not appearing....	15	2	931
Return to writ of error.....	8		926
day	8	5	926

	<i>Rule.</i>	<i>Sec.</i>	<i>Page</i>
Revenue cases advanced on motion.....	26	5	938
Second term, neither party ready for trial.....	19		933
Security for clerk's fees.....	10	1	928
Subpœna, service of.....	5	3	924
<i>Supersedeas</i>	29		940
Translations	11		930
Writ of error, return to.....	8		926
in cases involving jurisdiction of circuit			
courts	32		941
under act of March 3, 1891.....	36		943
Order in reference to appeals from court of claims...			947-948
Instructions as to applications for writs of <i>certiorari</i>			945-946

INDEX TO RULES OF THE CIRCUIT COURT OF APPEALS—APPENDIX III.

	<i>Rule.</i>	<i>Page.</i>
Adjournment, by judge or clerk.....	4	952
Appearance	16-22	963, 969
Argument	22	969
oral	25	986
Assignment of cases.....	35	998
of errors, when none.....	24	983
of errors required.....	11	958
Attorneys	7	1054, 1055
Bail, eighth circuit.....	35	1000, 1001
fifth circuit.....	37	1005
Bill of exceptions.....	10	957
Bonds, <i>supersedeas</i> and costs.....	13	958, 959
Briefs, regulations concerning.....	{ 24	982-986
	26	987, 989
Calendar, call and order.....	22	969
<i>Certiorari</i>	18	966
Clerk's office.....	5	592
Copies of records and briefs preserved.....	27	989
Costs	31	993
printing record.....	23	971
Counsel heard, when.....	{ 24	982-986
	25	986
Court, name of.....	1	949
terms of.....	3	949-952
Criminal cases, writs of error in, second circuit.....	35	998-999
in fifth circuit.....	37	1005-1008
bond and writ, form of.....	37	1005, 1006
Damages	30	993
Death of party.....	19	966, 967
Diminution of record.....	18	966
Dismissal, failing to file brief.....	24	983
failing to print record.....	23	971
no appearance of party	22	969
by agreement.....	20	968
on second call at second term.....	17	965
Docket, cases how entered on.....	17	965
Docketing cases.....	16	963

	<i>Rule.</i>	<i>Page.</i>
Errors, assignment of.....	11	958
Evidence, objections to in record.....	12	958
Exceptions, bill of.....	10	957
Exhibits, models, etc.....	34	998
Forms	37	1005, 1005
Hearing, assignments.....	35	1001
Interest	30	993
Mandate	32	995
Marshal and other officers.....	6	954
Models, diagrams, etc.....	34	998
Motions, requirements and procedure on.....	21	968
for <i>certiorari</i>	18	966
Opinions of court filed and recorded.....	28	990, 991
Orders, when no quorum.....	4	952
Party, death of.....	19	966
Practice, same as supreme court, when.....	8	957
Printing record.....	23	971
Prisoners, their custody.....	33	977
Process	9	957
Quorum	4	952
Records	14, 16	959-963
printing	23	1084, 971
cost of.....	23	971
original not withdrawn.....	5	952, 953
form of printed.....	26	987
Rehearing, regulations concerning.....	29	991
Return of writ of error.....	14	959
Seal of court.....	2	949
<i>Supersedeas</i> , bond for.....	13	958
Translations	15	963
Writ of error.....	14	959
in criminal cases (additional).....		959

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